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ANDREW J. GETZ,
Appellee,

vs.

WESTERN LABORATORIES, a
corporation,
Appellant.

210 I.A. 6

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment of the Municipal Court of Chicago for \$90.86.

Plaintiff was a member of the West Side Buying Club, a voluntary association of retail druggists, each of whom by agreement carried \$200.00 worth of diverse kinds of druggists' supplies from which members had the privilege of purchasing at cost.

Appellant negotiated an arrangement with a majority of the members of the association of whom plaintiff was one, whereby each member agreed to purchase a share of appellant's stock of the par value of \$100.00, and also deposit with appellant \$100.00 in cash, or its equivalent in merchandise, which was to be kept by appellant as a separate account and used only to purchase such supplies as the association should from time to time direct. Appellant agreed to carry stock which had theretofore been carried by the association and sell same to the members for cash at cost plus 2 per cent.

A writing was signed setting up these with other conditions stipulating that a "legal agreement" would thereafter be drawn "stating the length of time the contract is to be made for."

No further agreement was drawn, but many of the persons signing who were thereafter known as the Mortar &



2101.A.8

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

247. 23213
JAMES J. GATE,
Appellee,
vs.
WESTERN LABORATORIES, a
corporation,
Appellant.

MR. JUSTICE MATHRETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment of the Municipal Court of Chicago for \$20.88.

Plaintiff was a member of the West Side Buying

Club, voluntary association of retail druggists, each of whom agreement carried \$200.00 worth of diverse kinds of druggists' supplies from which members had the privilege

of purchasing at cost.

Appellant negotiated an arrangement with a majority of members of the association of whom plaintiff was one, where each member agreed to purchase a share of appellant's stock the par value of \$100.00, and also deposit with appellant \$100.00 in cash, or its equivalent in merchandise, which to be kept by appellant as a separate account and used by to purchase such supplies as the association should require to time direct. Appellant agreed to carry stock which theretofore been carried by the association and sell to the members for cash at cost plus 2 per cent.

A writing was signed setting up these with other conditions stipulating that a "legal agreement" would there- after drawn "within the length of time the contract is to date for." No further agreement was drawn, but many of the persons who were thereafter known as the North &

Pestle Club, delivered to appellant the supplies theretofore carried by them for the benefit of the association in discharge of their obligations to purchase stock and deposit cash or goods.

Plaintiff delivered to appellant \$90.86 worth of merchandise and he thereafter traded with his associate members through the agency of appellant. He sued to recover the value of the goods deposited.

Since the writing fixed no time for its termination, it could be ended at the will of either of the parties thereto. Joliet Bottling Co. v. Joliet Citizens Brewing Company, 254 Ill. 219.

If plaintiff was the only party to his side of the agreement, there might be merit to his suit, but the affidavit of defense sets up and the facts show that under the terms agreed upon the merchandise and its proceeds were subject to the orders of the club; that a separate account was kept between appellant and the club with respect thereto.

The liability of appellant, if any, (which we do not decide) is therefore to the association and not to any individual member thereof.

The judgment will therefore be reversed without remanding.

REVERSED.

Postle B. delivered to appellant the supplies thereto-
furnish them for the benefit of the association
in discharge of their obligations to purchase stock and
deposit in or goods.

Appellant delivered to appellant \$20.00 worth
of merchandise and he thereafter traded with his associates
members with the agency of appellant. He used to re-
cover value of the goods deposited.
The writing fixed no time for its termination,
it could be at the will of either of the parties thereto.
Joliet Bank Co. v. Joliet Citizens Savings Company, 234
Ill. 219.

Appellant was the only party to his side of the
arrangement might be next to his suit, but the affidavit
of defense up and the facts show that under the terms
of the merchandise and its proceeds were subject to
the order of appellant; that a separate account was kept
between appellant and the club with respect thereto.
liability of appellant, if any, (which we do
not decide) therefore to the association and not to any
individual thereto.
Appellant will therefore be reversed without
remanding.

REVEREND.

JOHN A. DEVLIN, a minor by
James Devlin his next friend,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

210 I.A. 7

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE BACCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment entered upon the verdict of a jury in an action on the case.

Plaintiff sued for injuries sustained by reason of one of defendant's cars striking the wagon in which plaintiff was riding while driving a team in the streets of Chicago.

The accident occurred about 5:30 P. M. October 26, 1911, at the intersection of Polk and State Streets. Polk Street at that point extends east and west; State Street, north and south.

Appellee was driving his team in an easterly direction on Polk Street and across State Street when his wagon was struck by one of appellant's south bound cars. Appellee contends the accident was due to the negligence of the motorman, while appellant argues it was due to the negligence of appellee and contends that contributory negligence on the part of appellee is established as a matter of law.

We have carefully considered the evidence and while the question is not entirely free from doubt, we think that within the rules announced in G. C. Ry. Co. v. Sandusky, 196 Ill. 402, and Chicago Union Traction Company v. Jacobson,

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217 Ill. 404, the question of contributory negligence under the facts disclosed by this record was for the jury.

The principal question in the case arises by reason of the admission over objection of defendant of evidence offered by the plaintiff as to a second injury, which he sustained on February 7, 1912, after the accident.

The evidence discloses that at the time of the accident, plaintiff sustained a fracture of the patella of the right knee. He was first taken to St. Luke's Hospital and from there to the Post Graduate Hospital where the knee was set. Splints were put on the leg and it remained in splints for about nine weeks. After these were taken off, plaintiff used crutches for a month and thereafter he used a cane, all under the advice of his physician.

While the injured limb, according to his testimony was still swollen, he was walking upon a sidewalk in the evening using his cane, when the left leg slipped and thereupon the right one doubled under him, fracturing the patella in the same place that it was originally broken. He was taken to the County Hospital where the limb was reset, and several weeks intervened before plaintiff regained the full use of it.

It appeared upon cross examination that three days prior to this second injury plaintiff had returned to his usual employment as a teamster and appellant urges that the collision with the car sustained October 26, 1911, may not be held to be the proximate cause of the subsequent injury on February 7, 1912. The question is raised both by objections to the evidence when offered, and by an instruction to the jury requested by defendant which was refused by the court.

Experts testified in response to hypothetical questions based upon the evidence in the case, for the plain-

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THE UNIVERSITY OF CHICAGO

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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and of Lawrence and Virginia, greatly improved. The

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Figure 1. The question is asked only by following

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tiff that the first accident might have caused, and for the defendant, that it could not have caused, the second injury.

In Seith v. Commonwealth Electric Company, 241 Ill. 252, the rule of law with reference to proximate cause is stated, "The negligent act or omission must be the cause which produced the injury, but it need not be the sole cause or the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time which in combination with it causes the injury or which sets in motion a chain of circumstances and operates on them in a continual sequence unbroken by any new or independent cause."

Whether within the rule a second injury received before a recovery from a prior one proximately results from the same cause as the prior injury, is ordinarily a question for the jury. Van Cleaf v. City of Chicago, 144 Ill. App. 496. In this case the testimony of the experts for the respective parties was in direct conflict on this point. Plaintiff testified that his limb was still swollen as a result of the first injury when the second occurred and that he was at that time still acting under the advice of his physician in the use and care of the injured limb.

The testimony for plaintiff to the effect that the second fracture was similar to the first also tends to sustain plaintiff's theory. It was the duty of plaintiff to use due care to effect a cure and prevent a second injury, failing in which he might not recover damages for such second injury, and defendant was entitled to have the jury so instructed upon request. It did not so request but tried its case on the theory that under the facts, the court should hold as a matter of law that the second injury did not proximately result from the first accident. We hold that this was not

a question of law for the court but of fact for the jury.

Wisting v. Town of Williston, 77 Wis. 530; Moseth v. Preston Mill Co., 49 Wash. 688; Conner v. Nevada, 128 Mo. 161; Papic v. Frund, 181 N. W. 1161; Smith v. Northern Pacific Ry. Co., 140 Pac. 687; Postal Tel. Cable Co. v. Mulacy, 132 Ala. 462.

Complaint is made that the court gave plaintiff's instruction No. 9 and we are inclined to think the instruction is subject to criticism. While a general exception was taken to the giving of this as well as all the other instructions asked by plaintiff, it appears that prior to reading the same, the instructions were considered by the court and counsel, out of the presence of the jury, in compliance with a rule of court which required this to be done. At that conference, the attorney for appellant said with reference to this instruction, "I have no objection to it if your honor will give this antithesis to it which I drew this noon * * * ." The court, "Then I will give it jointly, these two together. * * * " This was done. We think under the circumstances, defendant should not be permitted to complain.

The judgment is affirmed.

AFFIRMED.

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CHARLES KA-FARER, Appellee,

VS.

CHICAGO RAILWAYS COMPANY,
Appellant.

210 I.A. 9

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment entered by the Superior Court of Cook County upon the verdict of a jury.

Plaintiff sued defendant for personal injuries sustained by reason of a collision with one of defendant's cars. The negligence alleged was that defendant by its servants "so carelessly and improperly drove and managed its car that it ran into and struck a motorcycle upon which plaintiff was riding, injuring him, etc."

The accident occurred April 17, 1914, at about 9:15 in the evening at the intersection of Melrose and Robey Streets in the city of Chicago. Robey Street extends north and south; Melrose Street east and west. Defendant's street car line in Robey Street consisted of two tracks. North bound cars ran over the easterly, and south bound cars over the westerly track. The line was known as the Clybourne Avenue line and after passing Melrose Street turned east in Belmont Avenue. Robey Street at Melrose is 38½ feet between the curbs. The space between the west curb of Robey and the west rail of the west or south bound track is 11 feet. The sidewalks on Melrose are each 17 feet and 2 inches wide, there being a parkway between the curb and the sidewalk. The

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distance from Melrose Street to School (the first east and west street to the north of Melrose Street) is about 300 feet. On the northwest corner of Robey and Melrose at the time of the accident was a florist shop, another florist shop was on the northeast corner, on the southeast corner a saloon was located, while the southwest corner was a vacant lot.

Plaintiff at the time of the accident was accompanied by a young lady who occupied the rear seat on the motorcycle. Plaintiff sat in the front seat and drove the machine which weighed about 600 pounds.

Plaintiff testified that as he came to the corner of Melrose and Robey he slacked up; that just as he was crossing the cross-walk he noticed something which looked like a van coming from the north; that he was then going five or six miles an hour; that he then looked south to see if anything was coming from there; that he again looked to the north; that the car was then right close; that he turned the motorcycle towards the south and as he started to turn was hit by the car; that his leg was hit by the southwest corner of the car; that the fork of the car, as plaintiff called it, hit the front of the motorcycle. The femur of plaintiff's left leg was broken and he became unconscious and so remained for several days. There is no doubt of the seriousness of the injuries sustained.

Plaintiff's testimony as to the manner in which the accident occurred was corroborated by his companion who was at the same time severely injured.

No report of the occurrence was made to the street car company by its employees. However, appellant learned of the accident the following day through the police reports, but was not able to produce the persons operating the car

distance from the road (the road was
about 100 feet from the road) it was about 10
feet. On the northeast corner of the road
at the time of the collision was a lighted shop, about
10 feet from the road, on the northeast corner, on the road
corner a small building, while the northeast corner was
a small building.

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at the time of the injury. We do not, therefore, have the advantage of their version of the accident. However, evidence on behalf of appellant of persons who witnessed the collision was received and it tended to show that plaintiff driving his motorcycle at the speed of about ten miles per hour, ran it squarely into the side of the car.

We think the preponderance of the evidence is to the effect that the car was going at full speed and that it did not slacken its speed as it approached the crossing. While other questions are argued, the contention upon which appellants seem to rely is that plaintiff was, as a matter of law, guilty of such contributory negligence as to bar his recovery. "The general rule is that negligence and contributory negligence are questions of fact for the jury, but when the facts are admitted and all reasonable minds will agree that the injury was the result of the plaintiff's own negligence, the court may, as a matter of law, find that there was such contributory negligence on the part of the plaintiff as to defeat a recovery, and so inform the jury by a peremptory instruction." Hewes v. C. & E. I. E. Co., 217 Ill. 500.

Appellant argues that if plaintiff saw the car approach he must have been aware of the speed at which it was approaching and that he was guilty of contributory negligence "as by increasing the speed of his motorcycle he could have avoided being struck by that object"; that if, as it is claimed plaintiff said in another part of his testimony that he did not see the car until it was 15 feet from him, he was guilty of contributory negligence in not stopping.

Appellant also calls our attention to a line of cases in which it is claimed it has been held that a court will not permit a witness to say that he looked but did not see an

object, which it must be clear to everyone must have been seen had the witness looked. We do not question the rule there laid down, but in the nature of things, its application must depend upon the situation as disclosed by the facts of each particular case. The time, the distance, the mode of conveyance, the condition of the weather, whether in daylight or dark, in fact all the physical circumstances existing at the time and just prior to the time of the accident, must be considered.

In the instant case we think the question of whether plaintiff in the exercise of reasonable care could or should have seen the car in time to avoid the accident; whether he should or could have increased his speed and thus avoided the injury, and whether he should or could have stopped his motorcycle were all questions for the jury. In this view we are somewhat confirmed by the fact that counsel for appellant do not themselves seem to be quite certain which course of conduct should have been pursued. Unless upon the whole evidence all reasonable minds would agree that plaintiff was guilty of contributory negligence, the question of whether he was, or was not so negligent, was properly submitted to the jury.

The judgment will be affirmed.

AFFIRMED.

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 CHICAGO, ILL. 60637
 TEL. 773-9365

1. The purpose of this report is to provide information to the Board of Directors regarding the activities of the company during the year ended December 31, 1964.

2. The company has achieved significant progress in the development of its new products and services, and has successfully completed the construction of its new manufacturing facilities.

3. The company has also achieved significant progress in the development of its new products and services, and has successfully completed the construction of its new manufacturing facilities.

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10. The company has also achieved significant progress in the development of its new products and services, and has successfully completed the construction of its new manufacturing facilities.

273 - 23239

RICHARD W. POLLARD,
Appellee,

vs.

G. & J. COAL COMPANY, a
corporation,
Appellant.

210 I.A. 11

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant below from a judgment for plaintiff rendered by the Municipal Court of Chicago. The case was tried without a jury.

Plaintiff sued for \$66.00 being the aggregate amount of eight (8) coupons representing accrued interest due upon certain bonds issued by defendant below, appellant here.

The affidavit of merits set up that the coupons "were never negotiated by defendant company, but were obtained by the plaintiff herein through fraud and circumvention and are without a good or valuable consideration and void."

It appeared from the evidence that the bonds to which these coupons were attached, were with other bonds delivered by defendant to plaintiff as security for two loans aggregating \$1100.00. Shortly thereafter an arrangement, the terms of which are not quite clear, was made by which plaintiff was to raise the sum of \$600.00 to assist in financing appellant and was to receive stock in the company therefor. Apparently appellee was not able to raise these additional funds; creditors were pressing for the pay-

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Admission of "new" immigrants to the United States, of any race, color, or

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subject of this case was released on 11/10/00.

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ment of their claims and one F. M. Gray undertook to become interested in the company and finance it.

A meeting was held at Gray's office. At this meeting plaintiff surrendered all the stock which had been issued to him and also all bonds deposited as security except an amount equal at par to the money he had loaned to and put into the company which he retained in settlement.

It appears that practically all the creditors, officers, directors and stockholders of the corporation, with the exception of Mrs. Jones, the wife of the president of the company, were present at the meeting and assented to the settlement made. Appellee was succeeded by Gray as treasurer of the company. Coupons representing interest on appellee's bonds maturing prior to the ones here sued on were paid.

We are unable to see how the facts appearing in evidence could be held to prove fraud. Fraud is not presumed. It must be proved by the party alleging it and by clear and convincing evidence. McKenna v. Mickelberry, 242 Ill. 117. Negotiable paper which has been executed and delivered is presumed to have been regularly issued for a valuable consideration. Ferry State Bank v. Elledge, 109 Ill. App. 179.

There was no evidence in the instant case to overcome that presumption and the judgment will be affirmed.

AFFIRMED.

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THE UNIVERSITY OF CHICAGO

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1. *Journal of the American Medical Association*, 1990; 263: 1001-1005.

285 - 23251

JOHN W. MORSEBACH, Appellee,

vs.

MORRISON F. WADDELL, Appellant.

210 I.A. 12

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant below from a judgment of the Municipal Court of Chicago. The cause was tried by the court without a jury. The alleged "correct statement of facts" has heretofore been stricken, hence we can only consider errors assigned on the common law record. Appellant urges that he was improperly denied trial by jury.

The record shows that an alias summons issued July 13, 1916, returnable July 22, 1916, at 9:30 A. M.; that on July 21, 1916, defendant entered an appearance in writing; that on July 22, 1916, on defendant's motion, the time to file affidavit of merits was extended ten days; and that on July 31st, 1916, an affidavit of merits was filed in which for the first time trial by jury was demanded. This was too late. Hurd's Rev. Statutes, Chap. 37, Sec. 30; Williams v. Gottschalk, 231 Ill. 175; Morrison Hotel & R. Co. v. Kirsner, 245 Ill. 431.

The judgment will be affirmed.

AFFIRMED.

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WILLIAM J. NEWMAN COMPANY,
a corp.,

210 I.A. 24

Appellant,

vs.

SANITARY DISTRICT OF CHICAGO,

Appellee.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The Sanitary District of Chicago, appellee, having, on July 1, 1910, hired a derrick of the William J. Newman Company, appellant, and having, on January 1, 1911, returned it, the appellant brought suit in an action on the case, claiming that the derrick, when returned, was in bad order and condition, and by reason thereof, it was entitled to damages. The cause was tried before a jury, a verdict rendered in favor of the appellee and judgment duly entered thereon.

The evidence shows that sometime in July 1910, the appellee rented or hired the derrick and agreed to pay appellant \$325. a month for its use. Arrangements were made with one Newman, president of the appellant company, for transporting the derrick, which was located in Grant Park at about the foot of Monroe street, to the new channel in Evanston, and, according to the testimony of Newman, the appellee agreed "to rent the derrick for \$325. a month and pay \$100. for loading the derrick on a scow and return the derrick to my yards; he pay the freight,

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free of cost, when he was through with it, ordinary wear and tear excepted. The derrick to be returned in as good shape as when he received it." The evidence of Kelly, assistant engineer of the appellee, is to the effect that at the time of the conversation between Newman and him, nothing was said "in reference to the return of a derrick in good condition." The derrick was delivered to the North Shore Channel and remained there for about six months, during which time it was not used at all. It was then shipped back by appellee, according to Newman's directions, to the yards of the appellant company, at 46th street and Chicago avenue.

The evidence of the witnesses who unloaded the car and took the derrick out, was to the general effect that the derrick was in bad condition, certain timbers being broken and various parts missing, and that the cost of repairing the derrick would be \$500.

The evidence of the witnesses produced by the defendant was to the effect that at the time the derrick was loaded on the cars at the Drainage Canal, to be sent back, it was in good condition, and Frolich, who was employed by the Belt Railroad, as agent, testified that he found it in fairly good condition and gave the Railroad a clear receipt for it, and that it was delivered to the yard of the appellant about three hours after it was received.

It is the contention of the appellant that the trial judge erred in giving the following instructions:

There is no doubt that the information contained in this report is reliable and that the information is true and correct. The information is true and correct.

[illegible][illegible]

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"The court instructs the jury that, as a matter of law the bailee, in a mutual bailment, is not an insurer of the property bailed, but is bound to exercise ordinary and reasonable care, or the care that a reasonably prudent man would take of similar property under similar conditions. If the jury finds such a reasonable care has been exercised, they will return a verdict for the defendant."

Upon the theory of the appellee that at the time of the hiring of the derrick, nothing was said in reference to the return of the derrick in good condition, it was entirely proper for the appellee to have the jury instructed that it, the appellee, was not an insurer of the property bailed and was bound to exercise, under those circumstances, only ordinary and reasonable care.

On the other hand, appellant, on its theory of the case, was entitled, if it saw fit, to have the jury instructed as to the law applicable where the bailee has promised to return the property "in as good shape as when he received it."

Considering the claim of the appellee, therefore, that, according to the evidence it was a case of mutual bailment, and that the only special contract arose by reason of the words "ordinary wear and tear being excepted", all that was legally required of appellee was reasonable care, (Shouler on Bailments, Sec. 134) and the instruction given was proper. We are, therefore, of the opinion that no error was committed in giving to the jury the instruction in question.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

The first thing I noticed when I stepped out of the plane was a warm, humid breeze. It was a relief after the cold, dry air of the airport. I looked around and saw a mix of people, some in formal attire and others in more casual clothing. The scene was bustling with activity, and I felt a sense of anticipation. I took a deep breath and stepped forward, ready to begin my journey.

As I walked through the terminal, I noticed the familiar sights and sounds of a busy airport. The overhead announcements were a constant stream of information, and the people around me seemed to be in a hurry. I felt a bit out of place, but I tried to keep my composure. I followed the signs and eventually found my way to the check-in counter. The staff there were friendly and helpful, and I quickly got my boarding pass. I then proceeded to the security checkpoint, where I went through the usual screening process. It was a bit of a hassle, but I knew it was necessary for my safety and the safety of others.

Once I was cleared by security, I found my gate. The plane was already boarding, and I saw many familiar faces. I greeted them and then found my seat. The flight attendant came over to my seat and welcomed me. She was a young woman with a friendly smile, and she seemed to be in good luck. She handed me a small bag of snacks and a glass of water. I thanked her and settled in for the flight. The plane took off smoothly, and I felt a sense of peace and tranquility.

The flight was uneventful, and I arrived at my destination without any problems. I was greeted by a friend who had been waiting for me. We went to a nearby restaurant and had a meal. The food was delicious, and the atmosphere was relaxed. I felt like I had reached an old friend. We talked for hours, catching up on each other's lives. I felt a sense of comfort and familiarity. I knew that I had found a place where I belonged. I was happy to be here, and I was looking forward to the future.

I felt like I had found a new home.

Wish

244 - 23210

WINFIELD S. ALLISON,

Appellee,

vs.

LOUIS SUMNER,

Appellant.

210 I.A. 25
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Winfield S. Allison (plaintiff) brought suit in the Municipal Court against Louis Sumner (defendant) on his guaranty of certain promissory notes and recovered a judgment in the sum of \$1073.15. Trial was had without a jury and from that judgment this appeal is taken.

It appears from the record that one Gordon was indebted to Allison in the sum of \$1700., and a note for \$1700., was signed by Gordon, payable to Allison. The latter demanded "security" on the note. Gordon then asked Sumner if he "would sign it" and he refused, but offered to endorse for that amount providing Gordon paid \$100 each month. Gordon called up Allison and told him Sumner would sign notes aggregating \$1700, payable \$100 each month. Allison accordingly consented and made out seventeen notes, each, for \$100., all of which were signed by Gordon, who then left them with Allison with the "understanding" that the notes should be sent down to Pecria, for the "endorsement" of Sumner. After being mailed to the

latter place, they were returned, on October 21, 1910, to Allison, having been endorsed by Sumner. On the back of each note, above Sumner's signature, as the notes appeared at the trial, a contract of guaranty was stamped. Allison says that the contract of guaranty on the back of each note was put there at the time the notes were made and before Gordon signed them. His son, Wade S. Allison, cashier of his bank, corroborates him. Both Gordon and Sumner testified that the rubber stamp guaranty was not on the notes when they signed them. Only six of the notes in question were paid by Gordon and, accordingly, this suit was brought against Sumner as guarantor on the remaining eleven notes.

Evidence was also offered in regard to an alleged extension of time. Gordon testified that on January 1, 1913, in a conversation over the telephone, "Mr. Allison said he would extend the note another year if I would pay the interest. He said he would carry me another year providing I would pay seven per cent." It does not appear when the interest, however, for the year 1913 was paid. Of the eleven notes which became due on March 1, 1912, none were paid, and on most of them there was interest unpaid and overdue. There is an endorsement on each note showing the interest was paid up until January 1, 1913, and no endorsements of later payments of interest. Gordon testified, as to the time when that endorsement was made, "I paid sometime in January (1913); I could not say exactly what date. I sent it to Mr. Allison and paid it"; also that he talked with Allison over the telephone and the latter said, "I can carry the notes for another year now

with seven per cent interest"; that in January 1914, he paid some interest. Evidence, also, was offered in an endeavor to show that Gordon made a composition with his creditors which released the defendant as a surety. Some time in July, 1914, Gordon made a composition with his creditors and M. C. Rasmussen was appointed trustee. A claim was made by plaintiff (Allison) and sent to Rasmussen as follows:

"Winfield S. Allison, being first duly sworn, on oath deposes and says that he is a resident of the Village of Gardner in the County of Grundy and State of Illinois; that he is the legal owner and holder of eleven notes, each in the sum of One Hundred (\$100.00) Dollars, dated October, 1st, 1910, and signed by Abe Gordon; that said notes are due respectively - one thirty (30) days after date, and one each month thereafter until all are paid; that the sum due on said notes, together with the accrued interest thereon, is Twelve Hundred Six and 93/100 (\$1,206.93) Dollars; that this affiant is desirous of participating in the distribution of the assets of said Abe Gordon now held by the Chicago Association of Credit Men."

September 17, 1914, Rasmussen sent a check for the sum of \$301.73, to H. B. Smith, an attorney, who represented Allison and a number of other creditors, in full for Allison's dividend out of Gordon's estate. On receipt of which Smith, on September 18, 1914, sent the following letter to Rasmussen:

"In re Abe Gordon, Gardner, Illinois.
Yours enclosing check No. 1261 on the Home Bank and Trust Company for \$301.73 in payment on the Allison account received.
Your circular letter states that this is the first and final dividend of 25% which is in full settlement and release. Appended to your circular letter is a statement that the check is for the dividend on the claim

of W. S. Allison without a release.

This makes it a little equivocal, and while we are perfectly willing to accept the check on Mr. Allison's account, we cannot in any way agree to release Mr. Gordon without the consent of Mr. Sumner, who is guarantor on the Gordon paper. It would not be fair to Mr. Sumner to do so, and besides we are inclined to think that the legal effect would be to release Mr. Sumner from his obligation to Mr. Allison.

Mr. H. B. Smith of our firm, who has talked with Mr. Sumner about this matter, is well satisfied that he does not seek to escape his obligation in any way, but we are compelled to see that this is clearly understood about the acceptance of the check, as matter of duty to our client.

Would you please write us a line by return mail, stating that the check is not sent with the intention of releasing Mr. Gordon or Mr. Sumner?

In the matter of other claims which we represent, we wish to say that as soon as we can advise our clients of the situation, we will either secure releases from them, as suggested in your letter, or notify you to the contrary."

The check in question was held by Smith until May 18, 1915, (about eight months) at which time it was cashed. In the meantime Smith, after talking to Rasmussen in regard to his reasons for not cashing the check and thus allow Rasmussen to close the estate, called on Sumner demanding that he pay the balance due as guarantor. Smith testified that Sumner told him he had requested him to cash the check a number of times and stop the interest on the notes; that this was some time near April 1, 1915; that Sumner said, "there were some credits due him and that he was willing to go ahead and pay the balance due Mr. Allison in payments of fifty dollars a month"; that he (Smith) told him he had asked Mr. Allison to consent to that arrangement before, but he was unwilling to do so; that about thirty days prior to that he had had a conversation with Rasmussen and he (Rasmussen) had Sumner come over; that Sumner asked him to call Allison on the ^{telephone} ~~phone~~ and see if he would accept

fifty dollars a month; that Allison answered that he "wanted the matter entirely cleaned up"; that "Sumner then asked me if I would find out at what price Allison would take the Gordon homestead at Gardner", apparently to apply on the notes. These conversations were all denied by Sumner. On cross examination Smith testified that Sumner told him Rasmussen represented him; that one of these conversations took place in Rasmussen's office in his and Sumner's presence.

Rasmussen, for the defendant, testified that he had quite a number of talks with Smith, and several talks with Allison and Sumner about the notes, but the record fails to show what they were.

It is contended that the defendant is not liable for the following reasons:

1. That the contract of guaranty was not binding because it was put upon the notes subsequent to their execution and delivery by the maker to the payee, and without a consideration.
2. That the guarantor was released when an extension of the time of payment was given without his knowledge or consent.
3. That the plaintiff and other creditors entered into a composition with Gordon, releasing him, without reserving any right of recourse against Sumner.

There is a serious conflict of evidence as to the time when the contract of guaranty was put upon the back of these notes. Allison and his son testified it was put there before they were signed by Gordon. Sumner and Gordon, in

their testimony, both deny that the guaranty was on the notes at the time they put their signatures to them. Sumner's only reference to this question in his affidavit of merits is the statement that the guaranty was not on the notes "before delivery thereof." He does not deny it was on the notes when he signed them. The record does not show, in the conversations prior to the execution of the notes, any promise or request that a guaranty should be given. But the trial judge saw and heard the witnesses - had the original notes before him - saw the endorsements thereon, and was in every way better situated than we are to decide the question. He found that there was sufficient evidence to hold with the plaintiff, and we cannot say, in view of the record as it appears before us, that his judgment was against the manifest weight of the evidence.

The objection that the guarantees on the notes were signed by the defendant three weeks after the date of their execution and were, therefore, void, is untenable. Gordon knew the plaintiff had refused to take his \$1700 note without some "security". He, therefore, got the defendant's consent to be the "security". His agreement with the plaintiff included the "signature" of defendant who happened to be in another city when the notes were executed by Gordon. This is not denied by defendant for he testified, "When I signed these notes, I did it in accordance with the understanding and agreement between myself and Gordon and Allison." In order to consummate this agreement, and the notes in question are only evidence of an agreement, there had to be execution and delivery. When the notes were handed to plaintiff by Gordon, the transaction was incomplete. There was no legal "delivery" until all the terms of the agreement as to

the form of the notes had been actually carried out and the notes back in the possession of the plaintiff.

Counsel for appellant correctly urge that where a guaranter endorses a note, after a legal delivery to the payee is consummated, a consideration must be shown. That is the rule, "Unless", as the Court said in Hyde v. Sokol, 178 Ill. App. 601, "it appears that it was agreed between the maker, the payee and the endorser that the latter should guarantee the note." The trial judge evidently was of the opinion that Sumner, in accordance with his prior agreement to be security, signed the notes after the guaranties were stamped on them, and we are not justified, in view of the record, in holding otherwise.

It is contended, further, by the defendant that a valid agreement was entered into between Gordon, the maker, and the appellee, by which the maker agreed to extend the time of payment another year upon the payment during that year of the same rate of interest, and that such agreement was a valid and binding extension of the payment of the note, so as to release the defendant. The principle of law applicable to the facts as the defendant conceives them is set forth in English v. Landon, 181 Ill. 614, in which the court said: "To effect a discharge of a surety by such extension of time the evidence must show a new contract was made. It must show the time of payment was extended beyond maturity, for a definite time and for a good or valuable consideration.* * * What one is legally bound to do is not in law a valuable consideration and is insufficient to support a promise." In view of the propositions of law, 4, 5, 6, and 7, which were held by the trial judge, we are bound to infer

that he was of the opinion as to the facts that the evidence did not sufficiently prove a valid contract of extension which released the surety, and, inasmuch as the evidence, as it appears before us in the record, in regard to the alleged contract of extension, is vague and uncertain, we do not feel justified in concluding that the opinion of the trial judge, on that subject, was clearly against the weight of the evidence. As to the contention that the plaintiff entered into a composition with Gordon, releasing him without reserving any right against the defendant, we are of the opinion that the evidence not only fails to show a release, but tends very strongly to show a recognition and ratification of the obligation long after the composition occurred.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

There is no doubt that the evidence in this case is sufficient to establish the guilt of the defendant. The evidence is overwhelming and leaves no room for doubt. The jury should find the defendant guilty of the crime charged.

[illegible]

194 - 23537

JOSEPH F. GRISWOLD,

Defendant in Error,

vs.

H. PAULMAN & COMPANY, a
corporation, and JAMES W.
DUNLAP, (Defendants.)

JAMES W. DUNLAP,

Plaintiff in Error.)

210 I.A. 45

WRIT TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Joseph F. Griswold, brought suit against H. Paulman & Co., a corporation, and James W. Dunlap, for a breach of contract in the sale of an automobile, and recovered judgment before the trial judge, without a jury, against the defendant, James W. Dunlap, in the sum of \$550., to reverse which this writ of error is prosecuted.

A statement of claim was filed by the plaintiff setting forth "a breach of an expressed oral warranty made by the defendants to plaintiff in the month of November 1914, that a certain second hand automobile then sold by defendants to plaintiff, for the sum of \$350., was a 1912 Model 7-passenger touring car, in first-class condition mechanically, and in all other respects, except only as to the motor"; that "said automobile was not a 1912 model, nor in first-class condition as represented." It then recites certain alleged defects in the automobile purchased, and that "plaintiff necessarily spent the sum of, to-wit,

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\$200., for the reasonable costs of repairs, in order to operate said automobile"; that "said automobile was wholly worthless."

The defendant, H. Paulman & Co., filed an affidavit of veritas denying the warranty and denying, among other things, the defects alleged by the plaintiff in the statement of claim, and alleging "that the contract for the sale of said automobile was with the defendant, H. Paulman & Co., alone, and not with James W. Dunlap, jointly. Both the defendant, H. Paulman & Co., and the defendant James W. Dunlap, were duly served with a summons on May 2, 1916. On May 3, 1916, on a motion of the plaintiff, the default of the defendant, James W. Dunlap, for the want of appearance was entered. On October 16, on motion of the plaintiff, the defendant, H. Paulman & Co., was dismissed out of the case and the court then upon "the evidence contained in the affidavit of plaintiff's claim", found that there was due to the plaintiff the sum of \$550., and entered judgment against the defendant, James W. Dunlap, for that amount, and costs. On May 3, 1917, over seven months after the entering of the judgment, James W. Dunlap, the defendant moved the court to vacate the judgment entered on the 16th day of May, 1916. That motion was duly overruled.

The defendant contends, first, that the court erred in entering judgment and assessing damages against him on the statement of claim and affidavit attached; second, that where two persons are sued in actions ex contractu, it is error to dismiss as to one defendant and take judgment against the other without amending the declaration or filing a new declaration showing liability; third, that

the statement of claim is insufficient because the affidavit attached thereto "does not state that he has knowledge of the facts."

As to the first contention of the defendant, we are of the opinion that the statement of claim constituted a sufficient foundation for judgment, bearing in mind that at the time the judgment was entered the defendant was in default for want of an appearance. A careful analysis of the statement of claim discloses that it sets forth sufficiently explicitly the nature of the demand made, and such a demand as constitutes, under the law, a cause of action. Of course, no complaint was made by the defendant until after judgment was entered, and, under those circumstances, a statement of claim may be sufficient where it might otherwise, if seasonably questioned, be considered insufficient. Gamble-Robinson Commission Co. v. Union Pacific Rd. Co., 180 Ill. App. 256; Edgerton v. Chicago Rock Island and Pacific R. Co. 240 Ill. 311; Paris Flouring Co. v. Imp. Cotte Milling Co. 181 Ill. App. 215; Umlauf v. Chappas Trop. Prod. Co., App. Ct. Opinion 23246, March, 1917.

As to the second contention: the statement of claim recites "an expressed oral warranty made by the defendants to the plaintiff." The fact that the word "defendants" appeared in the plural in the statement of claim did not prevent the trial judge from properly concluding that the statement of claim, without amendment, especially in case of a default, would support a judgment against the defendant, James W. Dunlap, the other defendant having been dismissed out of the case. ~~XXXXXXXXXX~~ Finch v. Wis. Dairy Farms

Co., 167 Ill. App. 400.

As to the third contention: In Rule 16 of the Municipal Court, it is provided that "the plaintiff shall file with his statement of claim * * * an affidavit sworn to by the plaintiff * * * stating that he has knowledge of the facts, showing the nature of his demand or verifying the statement of claim" etc. In the instant case, the statement of claim has attached to it a properly signed and sealed affidavit which recites, among other things, "that the said cause is a suit upon contract for the payment of money; that the nature of plaintiff's demand is on a contract as above stated" etc. We are of the opinion that the affidavit, referring, as it does, to the nature of the plaintiff's demand and reciting, as it does, that it is "upon a contract as above stated" is a sufficient verification to comply with Rule 16 of the Municipal Court.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

293 - 23259

HENRY LE BEAU,

Appellee,

vs.

THE CHICAGO AND ALTON RAILROAD
COMPANY, a corporation,

Appellant.

210 I.A. 47

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages for personal injuries. There was a verdict and judgment in his favor for \$3,000, to reverse which this appeal is prosecuted.

Plaintiff received the injuries complained of on August 24, 1902. Suit was begun and a declaration filed, December 5, 1902, charging defendant generally with negligence in the operation of a freight train. The defendant filed the general issue. Nearly four years afterwards, November 10, 1906, plaintiff filed four additional counts, based on the attractive nuisance theory,-- that the defendant was elevating its tracks at the Robey street crossing in Chicago; that plaintiff was a boy ten years old, incapable of exercising discretion, and was attracted by piles of sand which defendant had dumped near the street crossing to use in the elevation of its tracks, and that the defendant negligently permitted the sand to remain near its tracks; that plaintiff was attracted to and invited upon the sand piles and while playing upon the sand slipped and fell and was run over by the train. To these counts defendant filed

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the general issue. October 10, 1912, which was ten years after the accident, plaintiff filed three additional counts, based on theory that the defendant had violated certain ordinances of the City of Chicago in failing to guard its tracks at the street crossing and sound a whistle or ring a bell, and that while plaintiff was crossing over the tracks he was injured. The case was tried under these last counts.

The record discloses that the defendant maintained and operated two main tracks across Robey street. There is also evidence that tends to show that it also had a switch track across the street, although the evidence on this point is not clear. It also maintained and operated several switch tracks in the immediate vicinity to the east of Robey street. About noon on Sunday, August 24, 1902, a switch engine was pulling eight or ten cars from a switch which was north of the main tracks and to the east of Robey street. The switch branched off the north or westbound main tract and run in a northeasterly direction. The switch engine was pulling the cars from this switch onto the north or westbound main track. The engine was backing up with the cars coupled to the front end of the locomotive. The object of the crew was to shift the cars from the switch north of the main tracks to a switch south of the main tracks by pulling them west of Robey street and then switching them across the main tracks. The tracks were being elevated at Robey street and for that purpose defendant had piles of sand near the track, and particularly one pile of sand was located just north of the main tracks and ten or twelve feet west of Robey street. The train was moving slowly west across Robey street and just as it had passed over the crossing it stopped to permit the switchman

to throw the switch, and as the switchman was in the act of doing so, he heard an outcry from the plaintiff who was lying between the pile of sand and the north rail of the north track. The train had passed over one of plaintiff's legs so that it was necessary to amputate it about six inches below the knee. The index finger of the left hand was also severed at the first joint.

On the day of the accident, plaintiff, who was a little over ten years old together with two other boys who were each about seven years old, had returned from Sunday school shortly before noon. It was a bright summer day. The boys had been playing ball near the vicinity where the defendant's tracks cross Robey street. Plaintiff's theory as to how the accident occurred was that he and the two boys were south of the tracks near Robey street, having just returned from Sunday school; that they decided to play ball; that one of the boys who lived north of the tracks had a ball, bat and glove, and they all started north in Robey street across the tracks to get them; that the two boys who were with plaintiff, apparently ahead of him, crossed over the tracks; that plaintiff as he came just south of the first track stopped, looked and listened but did not hear or see any train; that there were some box cars just east of Robey street; that he went north on the east side of Robey street, and as he passed over the south track past the box cars he again looked east, but saw no train; that he continued and immediately the switch engine and train was upon him; that he turned towards the northwest and walked fast across the north track, came in contact with the pile of sand just north of the tracks and west of Robey street; that the same was soft and he slipped and

to London last January, and as the Government was in the way
of making war, he found no reason from the situation of the
country between the hills of Rome and the walls of the
city. The Italian had passed over the St. Lawrence River
and was now in New York City, where it was said that
he had been seen. The Italian Emperor of the East had also
been seen in New York City.

[illegible]

fell and the wheels passed over his leg and finger; that there was no flagman at the crossing at that time, and that the gates which had been operated across the street both at the north and south of the tracks had been removed, and that there was no bell rung or whistle sounded.

The defendant's theory was that the three boys were north of the tracks and were "hitching on" the cars as the train passed over the street; that they jumped off as they came opposite the pile of sand, and plaintiff slipped down and was injured.

The case was tried twice. On the first trial, June 20, 1913, the jury disagreed. The second trial began February 23, 1916. On behalf of plaintiff, the only witness who testified as to how the accident occurred was the plaintiff himself. The two boys who were with him both testified for the defendant that they had all been "hitching on" the cars. The testimony of plaintiff is very much confused, contradictory, and in a great measure incoherent. In fact it is impossible to get any clear idea from plaintiff's testimony as to how he claims he was injured, and in stating his theory as we have, we have taken his testimony in the light most favorable to him. In addition to himself plaintiff called the switchman on the train in question. He was standing on the footboard of the engine between it and the first car, on the south side of the train, and was looking east to get signals from his conductor, who was also on the south side of the train. He testified the train was going about eight miles an hour as it crossed Robey street, and that he did not notice any flagman. All of the train crew testified, as did the man who operated the gates, and the two boys on behalf of the defend

ant, as well as other witnesses. It would serve no useful purpose to analyze this testimony, but from an examination of all the evidence, we think it appears that there was no flagman at this crossing. There is some dispute as to whether the gates were operated. The gateman and other witnesses testified positively that they were operated at the time the train passed across the street. The testimony of other witnesses throws some doubt on this point. The fireman positively testified that he was ringing the bell prior to and at the time the engine crossed the street. Plaintiff testified he did not hear any bell and other witnesses did not recollect whether the bell was ringing. After a careful consideration of the evidence, we are of the opinion that the verdict of the jury sustaining plaintiff's theory as to how the accident occurred is manifestly against the weight of the evidence. We are not impressed by plaintiff's testimony as to how he was injured, and while one of the boys (Moissant) who was with plaintiff at the time and who testified for the defendant, made many contradictory statements on the stand, and we place little credence on his testimony, yet from the testimony of the other boy (Rundel), and the other witnesses and the physical facts, we are of the opinion that plaintiff was not injured in the manner in which he says he was. All of the witnesses testified, including plaintiff, that there was nothing to obstruct his view of the approaching engine and train of cars had he looked east after he crossed the south track. It was Sunday, and there is no evidence that there was any other train or any noise or traffic that would distract plaintiff's attention while crossing the tracks. He had lived for a number of years in the vicinity of this street crossing and was familiar with its dangers, and while plaintiff was but a little more

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than ten years old at the time of the accident, yet under the decisions he was capable of being guilty of contributory negligence; and in viewing the evidence in the most favorable light to the plaintiff, we are of the opinion that he was guilty of such contributory negligence as to bar his recovery. Kochler v. Chicago City Ry., 166 Ill. App. 571; Wilson v. Chicago City Ry., 133 Ill. App. 433.

The judgment of the Circuit Court of Cook County is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING ON FACT:

The Court finds as an ultimate fact that the plaintiff was guilty of contributory negligence which was the proximate cause of the accident and his resulting injuries.

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331 - 23297

PATRICK C. KELLY,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,

Appellant.

210 I.A. 61

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Patrick C. Kelly brought suit against the Chicago City Railway Company to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant. There was a verdict and judgment in his favor for \$2,000 to reverse which defendant prosecutes this appeal.

The record discloses that on July 4, 1914, about midday, plaintiff was driving a one-horse wagon north in Wabash avenue. In the wagon were three trunks and a valise which plaintiff was taking to the Lake Shore station. He obtained the baggage at 4838 Cottage Grove avenue and drove north, turning into Wabash avenue at Twenty-second street, and proceeded north in Wabash avenue until he came to Peck court or Eighth street. He then turned across defendant's tracks, and there was a collision between a southbound car and the wagon, as a result of which plaintiff was injured. Wabash avenue extends north and south in Chicago, and is sixty-eight feet in width from curb to curb, and is intersected at right angles by Peck court, the roadway of which

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is thirty- eight feet wide. Defendant owns and operates a double track street car line in Wabash avenue.

Plaintiff contends that he was driving east of the east or northbound track in Wabash avenue, and when he reached a point about the south side of Peck court, he turned his horse to the west across the tracks; that the car was coming south on the west track at a high rate of speed and before he had time to clear the tracks the car struck the wagon, throwing him to the pavement, whereby he was injured.

The theory of the defendant was that plaintiff was driving north in the east or northbound track, and when he was a short distance from the southbound car he suddenly turned his horse across the tracks in front of the car; that defendant was unable to stop the car in time to prevent the collision; that the car was ^{not} running at an excessive rate of speed.

Witnesses testified on behalf of plaintiff and defendant as to the distance between the car and the wagon when plaintiff swung across the tracks. Testimony was also given as to the speed at which the car was traveling, and as to what point the collision occurred, and on each of these questions the evidence was conflicting, and after a careful consideration of the evidence we are of the opinion that the verdict of the jury on the questions of defendant's negligence and plaintiff's contributory negligence should not be disturbed.

Defendant also contends that the court erred in giving instruction No. 2, offered by plaintiff; that the instruction was argumentative and misleading, and that its

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not
collided; and the car was turning at an excessive rate of
reference was made to help her out in time to prevent the
turned the corner across the tracks in front of the car; but
he was a short distance from the sidewalk and he suddenly
was driving north in the east or northward track, and then
the vicinity of the street was not visible.

Witness located on behalf of plaintiff and before me as to the distance between the car and the wagon was approximately twenty feet. Plaintiff was given as to the speed at which the car was traveling, and as to what point the collision occurred, and on each of these questions the evidence was conflicting, and either a question of the evidence or the weight of the evidence as to the location of the car at the time of the collision. That the verdict of the jury on the question of defendant's negligence and plaintiff's contributory negligence being

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chief vice is that it placed a higher degree of care on the defendant than on the plaintiff at and before the time of the collision. We have considered this instruction in view of the evidence, and it would serve no useful purpose to discuss and analyze it, for the reason that an instruction in almost the same words and the same in substance was held in a similar case not to constitute reversible error. West Chicago Street R. R. Co. v. Foster, 175 Ill. 396.

Complaint is also made of the closing argument to the jury by counsel for plaintiff, wherein he stated that if the jury did not believe that counsel had acted in good faith in giving all the information they had, then he was not fit to practice law. Counsel for defendant objected and stated that he had not charged any perpetration of fraud. Plaintiff's counsel further argued that defendant had dug up some old ordinances, -- "now just take a look at what he is trying to put over on Kelly here." Upon objection the court inquired if the ordinances referred to were in effect, and upon being informed that they were, he stated it did not make any difference how old they were so long as they were in effect, and later instructed the jury that the ordinances referred to were in effect at the time of the accident. Further in the argument counsel for plaintiff said: "Now, why should he bear this burden for the rest of his life? Why should not that burden be placed upon the party that is responsible for it? Are these men going to be killed at these crossing accidents, or injured at these crossing accidents by them and then a man come in and practically make the argument -- Mr. Ryan: You know that is improper. I object. Mr. Finn: Strike it out. The Court:

Read the remark. (Remark read.) Mr. Pinn: Well, I will withdraw that remark. The Court: Very well. Mr. Ryan: I except to it anyway, on the ground that it cannot be withdrawn after it is made." While the argument was improper, yet we are of the opinion that under all the circumstances it does not constitute reversible error.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

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ROY WOOLTON,

Defendant in Error,

vs.

R. C. CRIST, Inc., (a corporation,)

Plaintiff in Error.

210 I.A. 62

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Roy Woolton brought suit against R. C. Crist, Inc., to recover money which he had paid on account of the purchase price of motorcycles, \$113.95. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for \$76, to reverse which defendant prosecutes this writ of error.

The record discloses that the defendant was engaged in business in Chicago and among other things sold second hand motorcycles; that plaintiff called at defendant's place of business and purchased a motorcycle, paying part in cash and agreeing to pay the balance in installments. Plaintiff took the motorcycle, but it would not run properly and he returned it, taking in lieu thereof another motorcycle. The purchase price of the second one was more than the first. Upon a trial this motorcycle was also found unsatisfactory. It was returned to the defendant and plaintiff took in lieu thereof a third motor-

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group.

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cycle, and the price of which was more than the second. This one plaintiff contends was unsatisfactory in that it would not run, especially in going up grade. Plaintiff also contends that each of the motorcycles was defective in several particulars. After having the third machine for a few weeks plaintiff returned it and demanded the money he had paid, which was refused, and thereafter this suit was brought.

Plaintiff has not appeared in this court. The defendant contends that the judgment should be reversed, because the statement of claim does not state a cause of action. This was a case of the fourth class, where formal written pleadings were not required. The statement of claim was sufficient to show the nature of the demand and gave sufficient information to inform the defendant of the nature of the case it was called upon to defend. This is all that is necessary. Ruberg v. City of Chicago, 271 Ill. 404; Kappes v. Bacon, Gen. No. 23212, Appellate Court, First Dist.

It is further argued that the motorcycle was sold upon a written warranty which provided that if any part of the motorcycle or equipment was defective, the defendant would replace the same without charge; that the most that can be said of plaintiff's testimony is that the defect in the machine could be easily remedied, and that the defendant had agreed to do this, and therefore plaintiff was not entitled to return it and demand his money. There was evidence that tended to show that at the time the several machines were purchased the defendant guaranteed that they would work satisfactorily and that each of them did not run properly. On the contrary there was evidence that the

which, and the fact of which was shown in the records.

There was a certain amount of evidence in the records.

It was not true, especially in the records.

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machine in question could have been easily repaired and put in order. The court saw and heard the witnesses and evidently believed that the machines were not as guaranteed but on the contrary were of little or no value. We do not believe that the written guarantee in reference to replacing the defective parts excluded the oral guarantee that the machine was in good workable condition, and therefore if the evidence which tended to show that each of the machines was of little or no value was believed by the court, and under the judgment we must so presume, then plaintiff has received nothing for his money and the judgment is correct.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

machines in operation would have been easily identified and
put in order. The court saw and heard the witness on each
occasion and was fully satisfied that the witness was not
deceiving him. The witness was of 1811-1812 of age and was
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The judgment of the court is as follows:

is affirmed.

THE COURT

519 - 23337

UNIVERSAL FLOOR COMPANY,
a corporation,

Appellee,

vs.

GEO. W. STILES CONSTRUCTION
COMPANY, a corporation,

Appellant.

210 I.A. 63

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Plaintiff, a sub-contractor, brought suit against defendant, a general contractor, to recover a balance which it claimed was due under a contract entered into between the parties, amounting to \$2,126.54. The case was tried before the court and jury; there was a verdict and judgment in favor of the plaintiff for the amount of its claim, to reverse which defendant prosecutes this appeal.

The amended declaration on which the case was tried, consisted of two special counts and the common counts. The first count alleged that plaintiff had entered into a contract with the defendant, whereby for a consideration plaintiff was to lay certain floors in a hospital in Peru, Illinois; that plaintiff thereafter laid the floor as called for by the revised plans and specifications of the architect, in accordance with the contract. It also averred that plaintiff had furnished extra material and performed extra work at the request of the defendant. The second count averred the making of the contract; that plaintiff had completed the

work in accordance with plans and specifications of the architect and tendered it to defendant and that the architect gave to plaintiff his certificate calling for the payment of the balance due under the contract, and for the extra work and material.

The plans and specifications provided that the work should be approved by the architect and the building committee of the hospital. Plaintiff contends that the plans and specifications are not a part of the contract; that the contract is complete in itself and contains no requirement that the work shall be accepted by the architect or the building committee, and therefore it was error for the court to permit them to be received in evidence. This was not the position taken by plaintiff in the trial court on the trial of the case nor in its declaration, and no objection was made when the plans and specifications were offered in evidence. Manifestly plaintiff is in no position to make the contention here. Moreover, we are of the opinion that the plans and specifications were a part of the contract. The contract expressly says that work is to be done as per plans and specifications prepared by the Architect B. L. Hulsehns, and subsequent action of the parties themselves shows that they considered the plans and specifications a part of the contract.

Defendant contends there is a fatal variance between the allegations of the declaration and the proof, in that it was alleged that the work had been done in accordance with the terms of the contract, plans and specifications; that the work had been completed and tendered to defendant and an architect's certificate issued to plain-

tiff calling for payment; while the proof showed that the work was not done in accordance with the plans and specifications, in that it failed to show that the work had been accepted by the architect and the building committee, but on the contrary the undisputed evidence showed that the work was rejected by the architect and building committee, and that no certificate was issued by the architect. This variance was specifically pointed out by counsel for defendant on the trial when evidence was offered tending to show an excuse for failure to obtain the approval of the architect and building committee. At the close of all the evidence defendant moved the court to strike out and exclude all evidence offered by plaintiff tending to excuse plaintiff's failure to obtain the approval of the architect and building committee. The objection to the evidence and the motion were overruled. In Hart v. Sarsler Mfg. Co., 221 Ill. 444, and Metal Fire-proofing Co. v. Boyce, 233 Ill. 284, it was held that where an architect's certificate had not been obtained and an excuse was relied upon, it was necessary to allege the reasons for the excuse. In the Hart case it was said: "performance must never be averred by a party who relies upon an excuse for not performing, but he must state his excuse" and such "excuse for non-compliance must be averred in the pleadings and established by the evidence." In the Boyce case the court said (287): "When a building contract provides for an architect's certificate, such provision is a condition precedent to a right of recovery, and the excuse for the non-production of such certificate must be alleged and proved." And continuing the court said (289): "We think it is clear, by the great weight

of authority in this and other jurisdictions, that if the architect's certificate is not obtained, recovery can only be had on a declaration setting up the contract and stating the reason for failure to comply with the condition precedent requiring the furnishing of an architect's certificate."

The position of counsel for plaintiff, to obviate the force of these authorities, seems to be that it is not necessary to aver and prove the issuance of an architect's certificate or the approval by the architect and building committee, where performance and acceptance are averred and proved. The difficulty with this contention is that there was no attempt to prove acceptance of the work, but on the contrary the uncontradicted evidence was that the work was rejected. We think it clear that there was a variance between the allegations and the proof, and the evidence should have been excluded.

Plaintiff, however, contends that it was entitled to recover under the common counts; that where nothing remains to be done except to pay the balance due indebitatus assumpsit will lie. This is undoubtedly the law, but in the instant case something more was required of the plaintiff under the contract, viz., to obtain an architect's certificate and the approval of the building committee. This was not done. Furthermore, it was expressly held in the Hart case that a recovery under a building contract requiring the issuance of an architect's certificate could not be had under the common counts, where the certificate had not been issued.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded.

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376 - 23351

KATHERINE CONNORS,

Appellee,

vs.

NATIONAL COUNCIL, KNIGHTS
AND LADIES OF SECURITY, a
corp.,

Appellant.

210 I.A. 65
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Katherine Connors brought suit in the Superior Court of Cook County against the National Council, Knights and Ladies of Security, a fraternal benefit society, on a certificate issued to her brother, Joseph M. Maher. The amount claimed was \$1,200 and interest. There was a verdict and judgment in her favor for the amount claimed, to reverse which defendant prosecutes this appeal.

The certificate is dated August 21, 1909, and the insured died of acute pulmonary tuberculosis, December 26, 1910. The defenses were that the insured in his application for the certificate gave false answers to certain questions, and that he was not a member in good standing at the time of his death.

There were a great many questions in the application, and among them the following: "How many brothers have you living?" To which the deceased answered, "none;" "How many dead? None." The application was signed by the insured, who therein declared that the answers and statements to the

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questions propounded to him by the medical examiner were warranted to be true and fair; that the application should form a basis of the agreement and constitute a warranty, and that the application and medical examination should constitute a part of the beneficiary certificate. The certificate was issued in pursuance of the application, and provided that it was accepted upon said express warranties, conditions and agreements, and that the application and report of the medical examiner, which were made a part of the certificate, were true in all respects and should be held to be warranties, and further provided that in case any answer was false the certificate should be null and void.

Evidence was introduced tending to show that a brother of the insured, aged about thirty-nine years, had died March 29, 1907, in Chicago; that he had lived in Chicago for years and in the same home with the insured shortly before his death; that the insured attended the funeral; that the deceased brother was afflicted with pulmonary tuberculosis at the time of his death; that the immediate cause of his death was a surgical operation for hernia.

On the trial when the plaintiff was introducing evidence in rebuttal, the court of its own motion, told the jury that, "All the evidence introduced in this case for the purpose of showing that Patrick Maher, the brother of Joseph M. Maher, that he died of tuberculosis, is stricken out, and there is not such issue in this case, and under the rule of the court all the evidence tending to show, if there is any such evidence, that in his applica-

tion for this policy he stated that he had no dead brother, is stricken out and is not for your consideration." The defendant excepted, and we think this action of the court was error. If the insured had fraudulently made false answers that he had no brother dead for the purpose of inducing the defendant to issue to him the certificate, then there could be no recovery, whether the answer be considered as a warranty or a representation. Globe Mutual Life Ins. Co. v. Wagner, 188 Ill. 133; Crosse v. Supreme Lodge, K. & L. of H., 254 Ill. 80. As bearing on the question whether the untruthful answer was fraudulently made the question of the materiality of the answer should be considered. Where there are a great many questions asked the applicant, as in the instant case, and it is stated that the answers are warranties, the question whether the answers will be held to be warranties or representations depends upon the intention of the parties as gathered from the entire application, certificate, and all the attendant circumstances, including the materiality of the answers, and if it can be seen that it was not the intention of the parties that the answers should be considered as warranties, they will be held to be representations. Minn. Life Ins. Co. v. Link, 230 Ill. 273; Atkinson v. Nat. Council K & L of S., 193 Ill. App. 215. The question of the materiality of the answers is generally one of fact (Spence v. Central Accident Co., 236 Ill. 444) but it may become a question of law when all reasonable minds would arrive at the conclusion that the answer was material. Enright v. Knights and Ladies of Security, 253 Ill. 460. The evidence stricken out was material to the issue, and the action of the court was therefore erroneous. As there must

be another trial for this error, it is unnecessary to consider the argument of counsel as to other alleged errors.

The judgment of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

Testimony of [Name] of [Location] is in accordance with the
[Location] records of [Location] to [Location] and
[Location] to [Location] [Location] and [Location] [Location]
[Location] [Location] [Location] [Location] [Location] [Location]

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110 - 23450

MARY E. MILLER,

Defendant in Error,

vs.

EDWARD E. MILLER,

Plaintiff in Error.

210 I.A. 67

ERROR TO

SUPREME COURT,

COCK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

May 15, 1914, Mary E. Miller, filed a bill for divorce against the defendant, Edward E. Miller, charging extreme and repeated cruelty. The defendant filed an answer denying the cruelty. On March 21st, 1916, the cause came on for trial, it is stated, on the "regular chancery trial calendar." The defendant failed to appear. Complainant introduced evidence tending to support her cause of action, and also to show that the parties had entered into an agreement whereby the defendant had agreed to pay the complainant more than \$700 in settlement of all her claims against him. This sum was evidenced by three notes, which at the time of the hearing were overdue and unpaid. On March 30, 1916, a decree of divorce was entered, and it was found that there was due and unpaid on account of the settlement between the parties \$780.65; the court further found that complainant had obtained a life insurance policy in favor of the defendant. It was decreed that defendant should pay the amount found due within twenty days, and in default thereof execution should issue; that defendant should execute within

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twenty days a release of his interest in the insurance policy on complainant's life, and in case of his refusal or neglect to do so, a master in chancery was authorized to execute the release, all of which it was decreed should be in lieu of all alimony and a settlement of all property rights between the parties. On April 20, 1916, defendant moved for leave to file a bill of review to review the decree and asked that the execution be stayed. It was ordered that the execution be accordingly stayed, and the matter was referred to a master. The record discloses that afterwards on March 23, 1917, the order staying the execution was vacated.

The defendant contends that the decree is erroneous because it is not within the allegations of the bill, and that it was error for the court to receive evidence in reference to the settlement of the property rights of the parties and award alimony, for the reason that no such relief was sought by the bill. The contention is untenable. Section 13, chapter 40 R. S. provides that when a divorce is decreed the court may make such order touching the alimony and maintenance of the wife as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just. The prayer of the bill was that the bonds of matrimony be dissolved, and for general relief. We think the evidence showing there was a settlement of the property rights between the parties was properly admitted, and the provision for the payment of alimony properly included in the decree. Where there is a prayer for special and general relief, the court may grant such relief under the general prayer as the allega-

tions and proof permit, though the specific relief be denied. Casstevens v. Casstevens, 227 Ill. 847.

The contention that the court erred in decreeing judgment for the amount of the settlement entered into between the parties for the reason that there was an adequate remedy at law, and in decreeing a release of defendant's interest in the insurance policy, is without merit. The court had jurisdiction of the subject-matter and was authorized to grant complete relief under its general chancery powers as well as under section 17, chapter 40, R. S.

Complaint is also made by defendant that as there was no replication filed, but only a bill and answer, it was error to receive evidence except matters of record to which the answer refers. The certificate of the clerk attached to the record states that it is a "correct transcript of the record as per praecipe." The praecipe filed with the clerk and which is in the record does not purport to call for all the pleadings and matters of record, but only certain pleadings and other matters are called for. From all that appears from the praecipe, a replication may have been filed. But in any event the case was not heard on the bill and answer, but on the pleadings and evidence and in that state of the record the filing of a replication would be held to have been waived. Piot v. Davis, 241 Ill. 434.

Finding no reversible error in the record, the decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

1941-1942

1. The first step is to identify the problem or question that needs to be answered.

168 - 23511

JULIUS LIMBACH,

Plaintiff in Error,

vs.

JACOB VINON,

Defendant in Error.

210 I.A. 73

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Julius Limbach brought suit against Jacob Vinon to recover \$200. The case was tried before the court without a jury; there was a finding and judgment against the plaintiff, to reverse which this writ of error is prosecuted.

The record discloses that plaintiff, an attorney at law, was employed by one Frank A. Hobbs to collect a claim which the latter held against the defendant. Hobbs entered into a written contract with plaintiff providing the compensation that plaintiff was to receive for the services to be rendered. Plaintiff instituted suit on behalf of Hobbs against the defendant, and notified the defendant by registered mail that he had an interest in the suit, and claimed an attorney's lien in the matter. Afterwards, without notice to plaintiff, defendant settled the matter with Hobbs. Plaintiff then brought this suit.

The defendant contends that the notice sent by plaintiff to the defendant by registered mail was not a compliance with the act of July 1, 1909. (Laws of 1909,

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p. 97). It appears from the evidence that plaintiff mailed the notice to the defendant; that it was received by the latter and taken by him to his counsel; that the notice was then discussed between the defendant and his counsel, and that his counsel advised defendant to disregard it. In support of his contention, defendant cites the cases of Haj v. American Bottle Co., 261 Ill. 362 and Tuohy v. Chicago & Joliet Electric Ry. Co., 200 Ill. App. 446. In the latter case the opinion is only abstracted, so that the facts do not clearly appear. In the Haj case the notice was sent by mail, and the evidence on behalf of the defendant was that no one was authorized to open the mail, except the president, superintendent and book-keeper. All of these persons testified that they had never received the letter. In the instant case the defendant admitted receiving the notice, and that he took the same to his counsel and considered it. In these circumstances, we think the case is distinguishable from the cases relied upon by the defendant. As the defendant admitted the notice was received and considered by him and his counsel, we think this was sufficient. Dreyfuss v. Freud, Gen. No. 23275, Appellate Court, First Dist.; Smith v. American Bridge Co., 194 Ill. App. 500; Kinkade v. Gibson, 209 Ill. 246.

The defendant further contends that even if the notice was sufficient, plaintiff cannot recover, for the reason that the agreement entered into between the parties is void, in that by its terms Hobbs was prevented from settling his claim against the defendant; and that the contract is champertous, for the reason that it required plain-

tiff to prosecute Hobbs' claim at his own expense. We think the latter contention is untenable. A fair reading of the contract requires Hobbs to advance the costs and expenses of the suit. The contract, however, does provide that Hobbs shall not settle or compromise his claim without the assent of plaintiff, and that if Hobbs violates any of the provisions of the contract he shall pay the plaintiff \$1,000. Plaintiff argues that this provision does not prevent a settlement of the claim, but merely requires Hobbs, in case he settles without plaintiff's consent, to pay plaintiff \$1,000. We cannot agree to this construction. We think the true meaning is that Hobbs is prevented from settling without plaintiff's consent; and, under the law, any contract whereby a client is prevented from settling or discontinuing his suit is void, as such an agreement tends to foster and encourage litigation.

North Chicago Street Ry. Co. v. Arkley, 171 Ill. 100.

We are therefore constrained to hold that plaintiff cannot recover under the contract, and the judgment of the Municipal Court of Chicago must be affirmed.

AFFIRMED.

188 - 23331

CHARLES H. LEINERT,

Appellee,

vs.

DAVID K. JEFFRIS, surviving
partner of Frederick J. Jeff-
fris, aforesaid parties trad-
ing as D. K. JEFFRIS & COMPANY.)

Appellant.

2101 A. 74

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Charles H. Leinert brought suit in the Municipal Court of Chicago against David K. Jeffris and Frederick J. Jeffris, trading as D. K. Jeffris & Company, to recover \$614.28, for services rendered the defendant and a small sum of money advanced. Before the trial of the case Frederick J. Jeffris died, and the suit proceeded against the other defendant. The case was tried before the court without a jury, and there was a finding and judgment against the defendant for \$531, to reverse which this appeal is prosecuted.

The defendant contends that the finding is manifestly against the weight of the evidence, and therefore the judgment should be reversed. It is stated by counsel for defendant in their brief that this is the only question to be decided upon this appeal. As there is no bill of exceptions in the record, this point is not before us. There is, however, attached to the record filed in this court what is designated a bill of exceptions, which purports to

contain the testimony taken on the trial. This is not dated nor signed by the court. It was not filed in the Municipal Court, nor was it filed in this court, and consequently cannot be considered on this appeal.

As defendant has claimed no error which is before us, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

For the purpose of this study, the following data were collected from the records of the Department of the Interior, Bureau of Land Management, for the years 1900 to 1909. The data were obtained from the records of the Bureau of Land Management, which are maintained in the Department of the Interior, Bureau of Land Management, and are available to the public.

The data were obtained from the records of the Bureau of Land Management, which are maintained in the Department of the Interior, Bureau of Land Management, and are available to the public.

APPENDIX

210 I.A. 75

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

vs.

EARLE STARK,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT,
OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

August 22, 1916, Agnes Stark, in the name and by the authority of the People of the State of Illinois, by leave of the Municipal Court of Chicago, filed an information against her husband, Earle Stark, the defendant, charging that he without reasonable cause neglected and refused to maintain and provide for his wife and minor child, which was then about two years old. The defendant was arrested, and on hearing was found guilty as charged and placed upon probation for one year, upon condition that he pay towards the support of his wife and child \$6 per week. Afterwards on March 7, 1917, this amount was increased to \$7 per week, and on the 11th of April following, a motion was made that the allowance be again increased. The matter was continued until April 17th when it was heard, the defendant being present and represented by counsel. Evidence was introduced and an order was entered increasing the amount to \$10 per week. To reverse this last order defendant prosecutes this writ of error.

The defendant contends that the order is erroneous for the reason that there was no petition filed upon which

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OFFICE OF THE ATTORNEY GENERAL
STATE OF NEW YORK

IN SENATE
JANUARY 10, 1914

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the motion was based. No objection of this kind was made in the trial court and no authority is cited by defendant to substantiate his contention, and we know of none. The point is without merit.

It is also contended that the order is erroneous for the reason that the amount defendant was ordered to pay is unreasonable and excessive. Defendant argues that the evidence showed the wife was earning \$12 per week and defendant \$35 per month, and that his necessary expenses were \$12.50 per week; also that the defendant was indebted and that it was necessary for him to pay bills as well as support himself.

It was the duty of the defendant to support his wife and child. As stated by the trial judge: "my construction of the law is that no woman is compelled to go out to work for a living to support herself and child. If she has a husband he is compelled to take care of them." The defendant testified that his personal expenses were \$12.50 per week, and in these circumstances we think it clear that it cannot be said that \$10 per week for the support of the wife and child is excessive.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

The action was denied. It is suggested that this time was made
to the trial court and no objection is filed to the same.
It is suggested that the court should be asked to make
being in witness stand.

It is also suggested that the order is returned
for the reason that the court's decision was made on the day
it was made and no objection is filed to the same.
Evidence shows the wife was earning \$15 per week and the husband
and the wife were both employed as domestic servants.
\$15.00 per week; also that the husband was earning and
that it was necessary for him to pay bills as well as support
himself.

It was the duty of the defendant to support his
wife and child. As stated by the trial judge: "My husband
took of the law in that no woman is compelled to go out to
work for a living to support herself and child. It was his
duty as a husband to be compelled to take care of them." The defendant
and testified that his personal expenses were \$15.00 per
week, and in these circumstances he thinks it right that he
should be paid that \$10 per week for the support of the wife
and child in necessary.

The judgment of the trial court is affirmed.
It is affirmed.

437 - 23782

MARY E. MILLER,

Appellee,

vs.

EDWARD S. MILLER,

Appellant.

210 I.A. 76

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal from an order of the Superior Court of Cook County adjudging the defendant, Edward S. Miller, to be in contempt of court for failure to pay alimony. The record discloses that Mary E. Miller filed her bill for divorce against the defendant May 15, 1914. The defendant filed an answer, and the cause came on for hearing in the regular course. A decree was entered March 30, 1916, dissolving the marriage and awarding complainant in lieu of alimony \$780.68, together with an interest in a certain life insurance policy. Afterwards on April 20, 1916, the defendant made a motion for leave to file a bill of review, to review the decree and praying that the execution for the alimony be stayed. An order was entered referring the matter to a master in chancery and staying the execution. Nothing further appears to have been done until March 23, 1917, when the order staying the execution was vacated and set aside. On June 15, 1917, complainant filed a petition asking for a rule on the defendant to show cause why he should not be adjudged in contempt of court for failure to pay alimony, and on the 17th of the same month the defendant filed his verified answer. On June

67 A.1012

To complete the proof, we need to show that \mathcal{H}^1 is a \mathbb{C} -algebra.

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11-15-64

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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22, 1917, the defendant filed a record in this court seeking to reverse by writ of error the decree entered in the divorce suit as to the payment of alimony. We have this day filed an opinion in the writ of error case No. 23450. The matter came on for hearing before the chancellor on the petition and verified answer of the defendant, and after consideration thereof the court held the answer insufficient, found that the defendant had willfully refused to pay the alimony, and ordered him committed until such time as the decree was complied with, not, however, to exceed six months.

The matter was heard July 16, 1917. The defendant was not personally in court but was represented by counsel. Afterwards on July 21st, the defendant was brought into court and an order was entered finding substantially the same facts as in the order of July 16th, and committing defendant to the county jail, from which order this appeal is prosecuted.

When the matter came before the court on July 21st, counsel for defendant stated that he wanted to put the defendant on the stand and offer some other testimony. The court held that he had already disposed of the matter on the 16th, and intimated that if the defendant showed any disposition to pay the alimony or any part thereof, he would give him a chance. No such disposition, however, appears to have been shown by the defendant, but on the contrary, we think it clear that he was not endeavoring to comply with the decree, but to evade payment of the alimony. It may be noted that the writ of error was not sued out in this court until after complainant had filed her petition for a rule on the defendant to show cause why he should not be adjudged in contempt of court. Apparently

and, finally, the defendant's failure to produce any evidence in support of his claim that the defendant was not the author of the letter. The court found that the defendant's failure to produce any evidence in support of his claim that the defendant was not the author of the letter was a failure to meet his burden of proof. The court found that the defendant's failure to produce any evidence in support of his claim that the defendant was not the author of the letter was a failure to meet his burden of proof. The court found that the defendant's failure to produce any evidence in support of his claim that the defendant was not the author of the letter was a failure to meet his burden of proof.

The court found that the defendant's failure to produce any evidence in support of his claim that the defendant was not the author of the letter was a failure to meet his burden of proof. The court found that the defendant's failure to produce any evidence in support of his claim that the defendant was not the author of the letter was a failure to meet his burden of proof. The court found that the defendant's failure to produce any evidence in support of his claim that the defendant was not the author of the letter was a failure to meet his burden of proof.

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he was satisfied with the decree so long as he was not made to pay the alimony.

The defendant in his verified answer set up that since the order staying the execution was vacated, March 23, 1917, he had "suffered a severe failure of health"; that prior to such order he was earning as a physician and receiving from all sources an average of \$180 per month; that since the order was vacated he was earning and receiving from all sources barely \$150 per month and was earning from the practice of his profession an average of \$105 per month. The answer then sets up his office and personal expenses, aggregating \$117 per month, and an item of \$20 per month for keeping an automobile. It also set up that he was compelled to pay his dues in certain fraternal organizations amounting to \$5 per month, leaving him \$5 per month which he required for emergencies. We think the court was clearly right in holding that the answer was insufficient, and that the defendant had not shown any disposition to comply with the decree, but on the contrary was seeking to avoid the provision requiring payment of the alimony. He had made no payment of any kind, and the order of commitment was justified by the record.

The order of the Superior Court of Cook County is affirmed.

AFFIRMED.

the two parties with the purpose of doing so in the future.
made in my last message.

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The situation in the various countries was as follows:

204 - 23230

WILLIAM J. MURRAY,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY,

Appellant.

210 I.A. 86

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action on the case brought by William J. Murray, appellee, hereinafter referred to as the plaintiff, against the Chicago Railways Company, appellant, hereinafter referred to as the defendant, in which the plaintiff sought to recover damages for personal injuries suffered by him in connection with a collision between a street car belonging to the defendant and a motorcycle which the plaintiff was driving. The jury found the issues for the plaintiff and assessed his damages at the sum of \$10,000. Judgment was rendered upon the verdict, from which the defendant has appealed.

The collision occurred at the intersection of Robey and Adams Streets in the City of Chicago on Sunday, August 20, 1911, at about one o'clock in the afternoon. The plaintiff was twenty-two years of age. He was driving the motorcycle in question and Walter Wiele, a young man of about the same age, was riding with him, sitting upon the rear seat. The defendant operates a double track street car line on Robey street, which runs north and south. There are no street cars on Adams Street which run east and west.

28.4.10

THE LONDON AND NORTH-OXFORD RAILWAY

REPORT

1911

THE LONDON AND NORTH-OXFORD RAILWAY

THE LONDON AND NORTH-OXFORD RAILWAY

1911

It was found that the accident occurred on the line between the London and North-Oxford Railway and the Great Western Railway, near the station of Reading. The accident occurred on the 10th of April, 1911, at about 10.15 a.m. The train was a passenger train, and was carrying a large number of passengers. The train was travelling from London to Oxford, and was about 10 miles from Reading when the accident occurred. The train was travelling at a speed of about 40 miles per hour when the accident occurred. The accident was caused by the driver of the train, who was negligent in not stopping the train in time to avoid a collision with a goods train which was travelling in the opposite direction. The goods train was carrying a large number of goods, and was travelling at a speed of about 20 miles per hour when the accident occurred. The collision was a head-on collision, and resulted in the death of several passengers and the destruction of the train. The driver of the passenger train was found guilty of manslaughter, and was sentenced to a term of imprisonment. The driver of the goods train was found guilty of negligence, and was sentenced to a term of imprisonment. The railway company was found guilty of negligence, and was sentenced to a fine of £10,000. The accident was a serious one, and it is hoped that it will serve as a warning to other railway companies.

The collision occurred at the intersection of the London and North-Oxford Railway and the Great Western Railway, near the station of Reading. The accident occurred on the 10th of April, 1911, at about 10.15 a.m. The train was a passenger train, and was carrying a large number of passengers. The train was travelling from London to Oxford, and was about 10 miles from Reading when the accident occurred. The train was travelling at a speed of about 40 miles per hour when the accident occurred. The accident was caused by the driver of the train, who was negligent in not stopping the train in time to avoid a collision with a goods train which was travelling in the opposite direction. The goods train was carrying a large number of goods, and was travelling at a speed of about 20 miles per hour when the accident occurred. The collision was a head-on collision, and resulted in the death of several passengers and the destruction of the train. The driver of the passenger train was found guilty of manslaughter, and was sentenced to a term of imprisonment. The driver of the goods train was found guilty of negligence, and was sentenced to a term of imprisonment. The railway company was found guilty of negligence, and was sentenced to a fine of £10,000. The accident was a serious one, and it is hoped that it will serve as a warning to other railway companies.

There is a very slight jog in Adams street at this point, the curb lines west of Robey street being about three feet north of the same lines to the east of Robey street. All four corners are built up, there being a brick church on the northeast corner, the building setting back from the sidewalk a distance of seven or eight feet on both the Adams street and the Robey street sides. The other three corners are occupied by flat buildings, all of them coming out to the sidewalk line on Robey street and setting back a short distance from the sidewalk on Adams street.

The plaintiff testified in substance that he and his companion were riding along at a speed of about ten miles an hour until they reached a point about a block east of Robey street where he reduced the speed of the motor-cycle to about five miles an hour, which speed he maintained until the time of the collision; that, when about 75 feet east of the intersection, he looked to the north past the corner of the church building and saw no car approaching; that at about this time a north bound street car was crossing Adams street slowly and that he proceeded to cross Robey street about the time the rear of that car was leaving the north cross-walk; that he also looked to the south and saw another car approaching Adams street from that direction and about half a block distant; that, as he got about to the middle of the street car tracks, he, for the first time, saw a street car approaching from the north rapidly, without having given any signal of its coming; that at this moment the front of the south bound street car was at about the north building line of Adams street; that, as he proceeded across the south bound track, he turned slightly to the south to

avoid the car, and, when he had gone about three feet, the front corner of the car struck the back fork of the motorcycle, which was then in the middle of the south bound track, after which he remembered nothing. His companion, Niele, corroborated him in the main. The latter witness stated that Murray reduced the speed of the motorcycle to two or three miles an hour just as he got onto the tracks.

This collision was the subject of another suit against this defendant in which Walter Niele was the plaintiff, which had been tried some time previous to the trial of this case. One Stephen Lane testified for Niele, on the trial of his case, and, by agreement, his testimony was read to the jury in this case, on behalf of the plaintiff. At the time of the collision this witness was walking north on the east side of Robey street, fifty or seventy-five feet south of Adams street. He saw the south bound car approaching but did not see the motorcycle until it reached the sidewalk line on the east side of Robey street. Another witness for the plaintiff was a young man named Cooper, 14 years of age at the time of the accident, who testified that he was on the sidewalk at the northwest corner of the intersection at the time of the accident, having just walked up to that point from the west along the north side of Adams street. Another witness for the plaintiff was a Mrs. Buckley who lived on the south side of Adams street about five doors west of Robey street. At the time of the accident she was sitting on the porch in front of her house. One Fred Chapman also testified for the plaintiff as to the situation as he found it when he reached the point of collision from his home a few doors away a few

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moments after the collision had occurred.

Those who testified in behalf of the defendant as to the collision itself were John Lydon, the motorman of the car in question, Frank Jenowsky and Benjamin Greenfield, both of whom were passengers riding on the front platform of the car, and Samuel Schortekoff, another passenger who was sitting on the first cross seat on the left hand or east side of the car. Other witnesses testifying for the defendant, who did not witness the collision but who described the situation as they saw it immediately after the collision had taken place, were James Finn, the conductor of the car in question, Albert Wenslof, a motorcycle policeman, Mrs. Mary Beyers and James P. Durigan. The last two lived a few doors away and went over to the vicinity of the collision as soon as it had taken place.

As we view this case, the question of the presence or absence of north bound cars at or near the intersection at the time of the collision is an important one. The only witnesses who testified in this case to the presence of such cars were Murray, the plaintiff, Miele, his companion, and Cooper. Murray was a witness for Miele upon the trial of his case, and the record there shows that upon that trial Murray testified that as he approached this intersection he looked south and saw nothing and that he looked north but did not see anything and heard no bell of an approaching car. This is directly contradictory to his testimony in the case at bar which is to the effect that he saw two north bound cars, one approaching the intersection from the south and the other just leaving the intersection towards the north. Miele testified, on the trial of his own case,

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that, as he came into the intersection, he looked both ways to see if there were cars coming and that he could not see any cars. This also is directly contradictory to his testimony in the case at bar. The only other witness corroborating plaintiff's case as to the presence of north bound cars is Cooper who testified that he saw a car approaching from the south and also a car which passed the intersection going north, just before the motorcycle reached the intersection, and he seems to indicate that there were one or two more north bound cars a little further up to the north. This witness did not testify at all in the Miele case although the record here shows that while he had not given his name to anyone at the time of the occurrence, he had talked with Murray, about the accident, and had informed him that he had witnessed it, about a year after it occurred, which was some time previous to the trial of the Miele case. If this is true, it is hard to account for his absence as a witness at the trial of that case. It would seem that if Murray knew at the time the case of his friend Miele was being tried that this young man Cooper had been present at the time and witnessed the collision, and that his version of what occurred was as given by him in his testimony in the case at bar, he would have seen that his friend also had the benefit of that testimony. The fact that such an important witness is produced in the trial of the case at bar, for the first time, under the circumstances just set forth is in no way accounted for in this record. Of the other occurrence witnesses for the plaintiff, Stephen Lane, whose testimony given in the Miele case was read in the case at bar, testified that he did not see any car going north in HobeY street, and Mrs. Buckley testified both in the Miele case and in the case at

bar that she saw the motorcycle coming west in Adams street when it was about a block east of Robey street and that she watched it from that time until the time of the collision and that at no time did anything obstruct her view of the motorcycle, and, further, that no car passed going north during that time. All of the witnesses for the defendant who were questioned on this phase of the case testified to the effect that there were no north bound cars at or near this intersection at the time of this collision. A car came up to Adams street from the south a few moments after the collision occurred, having been two or three blocks away at the time of the collision and the crew of that car testified that at that time its leader was not in sight.

A careful examination of all the testimony in this record shows that the great weight of the evidence is in favor of the defendant on this point and is convincingly to the effect that there were no north bound cars at or near the intersection, a fact which tends greatly to weaken the testimony of the plaintiff and also of Miele and Cooper as to the remaining points involved.

The motorman, and the three passengers named above, all testified that as the street car cleared the church, coming into the intersection, the motorcycle was about 150 feet to the east. The three passengers and one of the neighbors, living on Adams street just east of Robey street, testified that the motorcycle was moving very rapidly. All of the defendant's witnesses in a position to testify as to the speed of the street car put it at 7 or 8 miles an hour. The occurrence witnesses for the defendant all state that as the car proceeded

across the intersection the motorcycle swerved to the south from a point at or near the east cross-walk and when the front of the street car had about reached the south cross-walk the motorcycle and its riders crashed into the front vestibule of the street car on the east side; that the car was brought to a stop in about 10 or 15 feet, when about half way over the south cross walk and that both the plaintiff and Miele were lying to the east of the car, the plaintiff partly across the corner of the fender which was hung under the car several feet back of the front end, and Miele several feet back of him, with the motorcycle between them. All of these witnesses state that at no time did any part of the motorcycle get out onto the south bound track in front of the car. Although Cooper and Lane testified to the contrary, and to the effect that Miele was thrown over near the southwest corner of the intersection, it is our opinion that the evidence conclusively establishes that the collision took place as indicated by the witnesses for the defendant.

The evidence having conclusively established, as we view it, that the plaintiff and his companion collided with the front vestibule of the car at or about the south cross-walk, it is impossible that the motorcycle was proceeding at such a speed as was testified to by the plaintiff and his witnesses, particularly Miele. They state that the speed was about 5 miles an hour, and Miele puts it at less than that; and the plaintiff himself states that at that speed he could stop his motorcycle in a space of two or three feet. That fact is corroborated by other witnesses. The only possible conclusion from all the evidence is that he was not only not

going at a speed of 5 miles an hour but that he was traveling at such a rapid rate as he came into this intersection as to constitute negligence on his part.

Without analyzing the testimony further, it is our opinion, after a careful consideration of it, that it fails to establish negligence on the part of the motorman of the street car, but, whether that be so or not, a judgment for the plaintiff cannot be allowed to stand because we feel that the evidence conclusively establishes that the plaintiff was guilty of negligence which proximately contributed to his injury and that on that point the verdict is against the manifest weight of the evidence.

We appreciate that this collision was distressing in its results and that it is unfortunate that the plaintiff suffered such painful and permanent injuries, but, being convinced that this would not have been his experience had he been in the exercise of a proper degree of care for his own safety, we are obliged to reverse the judgment of the trial court with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

FINDING OF FACTS:

We find, as a fact, from the evidence contained in the record in this case, that the plaintiff was guilty of negligence which proximately contributed to his injuries.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the root cause of the problem. Once the causes of the problem have been identified, the next step is to develop a plan to address the problem. This involves identifying the actions that need to be taken to address the problem and determining the resources that are needed to implement the plan. Once a plan has been developed, the next step is to implement the plan. This involves taking the actions that are outlined in the plan and monitoring the progress of the plan. Finally, the last step in the process is to evaluate the results of the plan. This involves determining whether the plan has been successful in addressing the problem and identifying any lessons learned from the process.

1. The first of these is the fact that the Government has been unable to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China. This has been due to a variety of factors, including the fact that the Government has been unable to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China.

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THE UNITED STATES OF AMERICA
DOES hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the
and is hereby attested by the Secretary of the said State.

HUGH K. MAC DONALD,

Appellee.

vs.

CHICAGO RAILWAYS COMPANY, ET AL
On appeal of Chicago Railways
Company,

Appellant.

210 I.A. 87

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of
the court.

This was an action for personal injuries brought
by the appellee, Hugh K. MacDonald, hereinafter referred
to as the plaintiff, against the Chicago Railways Company,
appellant, hereinafter referred to as the defendant, and
Henry J. Lutter, Henry W. Lutter, Adolph C. Lutter and
Frederick W. Lutter, who were also parties defendant when
the case was tried. It was agreed between the parties that
the Lutter Brick Co. was a partnership composed of Henry
W. Lutter, Henry J. Lutter and Adolph C. Lutter. By stipu-
lation of counsel, the court directed a verdict finding
the defendant Frederick W. Lutter not guilty.

When the plaintiff had concluded the presentation
of his case, the Lutters rested their case and introduced
no evidence. The trial then proceeded, the defendant the
Chicago Railways Company introducing its evidence after
which the jury returned its verdict finding the defendants
Henry J. Lutter, Henry W. Lutter and Adolph C. Lutter not
guilty and assessing the plaintiff's damages at \$7000.00.

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Judgment was entered upon the verdict from which the defendant the Chicago Railways Company has taken an appeal to this court.

The facts involved in the case are as follows:

Lincoln Avenue is a street running northwest and southeast in which defendant operates a double line of tracks. The track on the northeast side of the street is used for cars bound northwest and the track on the southwest side of the street for cars bound southeast. We shall refer to these two tracks as the north bound track and the south bound track. Just north of Addison street, Lincoln avenue is crossed by two overhead viaducts. In going northwest from Addison street on Lincoln avenue, the first viaduct reached is the crossing of the steam railroad tracks of the Chicago and Northwestern Railway, and the second one reached is the crossing of the Northwestern Elevated Railroad. Both of these crossings run practically north and south, hence the lines of intersection are not at right angles with Lincoln Avenue but are diagonal. The viaduct of the Chicago & Northwestern Railway is about 465 feet southeast of the structure of the elevated railroad. Underneath the steam railroad viaduct, Lincoln avenue is depressed 4 feet five inches below the street grade. The low level of the street depression underneath the steam railroad viaduct extends about 60 feet northwest of the viaduct and from that point on, going to the northwest, Lincoln avenue, including the street railway tracks, ascends an incline of 1.95% for a distance of about 220 feet to the regular street level which is reached at a point about 185 feet from the elevated structure of the Northwestern Elevated Railroad. Patterson avenue comes into Lincoln avenue from the southwest at right angles a few feet southeast of the elevated railroad structure. The

next street intersecting Lincoln avenue northwest of the elevated railroad structure is Waveland avenue.

At the time of the accident, the plaintiff, who was a man some 70 years of age, was a passenger on one of the cars belonging to the defendant and was sitting on the first cross seat on the left hand side near the front of the body of the car. The car was proceeding on Lincoln avenue on the north bound track. As the car left the Chicago & Northwestern Railway viaduct and approached the structure of the Northwestern Elevated Railroad, two wagons loaded with brick belonging to the Lutter Brick Co., one following the other, were coming down Lincoln avenue in a southeasterly direction, and, as they approached the elevated structure from the northwest, they were being driven in the south bound car track. The point at which the street car and the first brick wagon came abreast of each other was under the elevated railroad crossing. Before they came abreast, the inside horse drawing the first wagon became frightened by the noise caused by the passing of an elevated train overhead. The horse pranced about and reared up, and, as the car came on, the front vestibule just escaped the horse and the front corner of the body of the car on the left hand side struck the horse, throwing him over backwards. This caused the pole of the wagon to be drawn sharply in towards the street car, and, as the pole came in contact with the car, it broke the three front windows on the side of the car, penetrating into the car at the third window, opposite the point where the plaintiff was sitting, striking him in the face and inflicting the injuries for which he brought this suit.

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At the time of the accident, the defendant, who was then about 70 years of age, was a passenger in one of the cars belonging to the defendant and was sitting on the first screen seat on the left hand side near the front of the car. The car was propelled on a single

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in the same manner as the other two, but the first of the three is the only one which is not a member of the same family as the other two.

Transferred by the holder covered by the guaranty of no other interest, the holder agrees to pay the first coupon on demand.

as the car came on, the front vestibule just caught the
hairs and the front corner of the body of the car on the

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

The above information was obtained from a review of the files of the FBI, New York Office, dated 10/18/67.

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500 5TH AVENUE
NEW YORK 17, N.Y.

In contending that the judgment would be reversed, the defendant urges that the trial court erred in giving certain instructions. The eighth instruction given by the court was as follows:

"The court instructs the jury that the defendants, Henry J. Lutter, Henry W. Lutter and Adolph C. Lutter, rested their case at the close of plaintiff's evidence and you are further instructed that in considering your verdict, you are not to take into consideration any evidence introduced in this case by the codefendant, Chicago Railways Company, but must only consider such evidence as was introduced by the plaintiff."

The defendant urges that the giving of this instruction was tantamount to directing a verdict for the plaintiff and the defendant has directed our attention to a number of cases involving instructions in which the court gave what purported to be a summary of the facts in the case but failed to include all the facts necessary to be considered in arriving at a conclusion, and other cases in which the court, in giving a summary of the facts, directed the attention of the jury only to those favorable to one of the parties, leaving out of view all facts that tended to support the theory of the other party, which instructions were held to be reversible error. These cases do not seem to us to be in point. The defendant further contends that where instructions lay down contradictory rules, one erroneous and the other correct, the fact that the law is accurately stated by one instruction will not obviate or cure the error in the other, and that, therefore, the eighth instruction must be held to be erroneous, notwithstanding the fact that in other instructions given by the court, such reference was made to the evidence introduced by the defendant the Chicago Railways Company as to direct the jury to take all of it into consideration.

These cases are also not in point. There were, practically speaking, two defendants involved in this case, first, the Lutters, and, second, the Chicago Railways Company, and, in returning their verdict, it was incumbent upon the jury to make two findings, one as to the Lutters, and one as to the Chicago Railways Company. As applied to the Lutters, this instruction lays down a correct statement of the law. While it is true that the giving of an instruction purporting to state the law applicable to the facts involved but failing to state it correctly, is erroneous and such error is not cured by other instructions stating the law correctly, it is also true that the law applicable to different questions may be stated in separate instructions, and in such case, if the instructions present the law correctly when viewed as a series, it will be sufficient. Pardridge v. Cutler, 138 Ill. 504, 512; Montgomery Coal Co. v. Barringer, 213 Ill. 327, 337. This is especially true where the instruction does not direct a verdict. Chicago Railways Company v. Shreve, 236 Ill. 530, 539.

This is not a case presenting the question of correct and incorrect rules of law laid down in different instructions. As we have said, the eighth instruction is correct as far as the defendants the Lutters are concerned. True, it is somewhat ambiguous and may be said to be similar to an instruction involved in the Chicago City Railway Company v. McDonough, 221 Ill. 69, 75-76, where the court says, as to such instructions, that the rule is, they will not be considered reversible error where it is apparent that "the jury were fully instructed as to the law, and, taken as a series, the instructions are clear and unequivocal and the jury were not misled thereby." Another ambiguous instruction reading "If the jury believe defendant was in the exercise of due care

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for his safety", using the word defendant instead of plaintiff, was involved in National Enameling Co. v. McCorkle, 219 Ill. 557, 561, in which our Supreme Court lays down the same rule. In the case of Smith v. McDaniel, 32 N.E. Rep. 798, the complaint or declaration was in two paragraphs or counts and the court, in the first instruction given to the jury, stated therein that it was only necessary for them to give attention to the second paragraph of the complaint and then proceeded to state the substance of its contents. To this, counsel for plaintiff objected, and in their brief, they state in regard thereto "the court by the language employed conveys to the jury the idea that the averments of the first paragraph were established as a matter of course and that it was only necessary to invite their attention to the second paragraph." The court says "evidently such was not the intention of the court and the jury could not have so understood. The effect of this instruction was to withdraw the first paragraph from the consideration of the jury, which, under the circumstances, was not improper and could not in any wise have injured the appellants."

In the course of instructing the jury in the case at bar, the court used the following language:

"In determining on which side the preponderance of evidence is, the jury may take into consideration the number of witnesses testifying in support of and against any fact or state of facts. * * * and the jury may, from all these facts and circumstances, and a full consideration of all the evidence, determine upon which side is the greater weight of preponderance of the evidence. * * * You have no right to disregard the testimony of an unimpeached witness, if any, sworn on behalf of the defendant street car company simply because such witness was or is an employee of the defendant street car company, but it is your duty to receive the testimony of such witness in the light of all the evidence the same as you would receive the testimony of any other witness, and to determine the credibility of such employee by the same principles and tests by

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1. The Commission has received information from the Government of the United States of America that the United States has been providing military assistance to the Government of the United States of America.

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which you determine the credibility of any other witness. * * * If the plaintiff in this suit has not so established his case, or if the evidence is evenly balanced, or if you are in doubt and unable to say on which side is the preponderance, then, in either of these cases, the verdict should be not guilty."

One cannot read all the instructions given by the court in this case and escape the conviction that they were perfectly clear when taken as a whole and that the jury were not misled by the eighth instruction, although, when taken by itself, it is ambiguous.

The defendant complains also of the seventh instruction contending that it was contrary to and nullified the twenty-seventh and twenty-eighth instructions given by the court at the request of the Chicago Railways Company.

These instructions are not conflicting, nor do we think the trial court in giving the seventh instruction in any manner nullified the other instructions referred to. By the seventh instruction the court told the jury that by anything contained in the instructions the court did not presume to tell them what facts were established by the evidence, that being a matter which was their sole province. By the twenty-seventh instruction, the court told them that there being no evidence of any negligence before a certain point in the occurrence they were only called upon to decide whether the facts following that point, as shown by the evidence, established negligence on the part of the defendant. By the twenty-eighth instruction, the court put the subject-matter of the preceding instruction in another form, defining the law to the jury as applied to the situation therein set forth. In giving the seventh instruction the court was referring, of course, to all the evidence within the issues that were involved, and then by instructions twenty-seven and twenty-eight given at

the request of the Chicago Railways Company, the court limited the issues which the case involved, as therein indicated. Without regard to the question as to whether the latter instructions are correct, as applied to the facts in the case, it seems clear that they were in no way nullified by the giving of the seventh instruction.

The defendant further contends that the trial court erred in giving the first instruction which was as follows:

"The court instructs the jury that it is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, and consistently with the practical operation of the road, reasonably to guard against accidents and consequential injuries to their passengers, and if they neglect to do so, they are to be held strictly responsible for all consequences which directly flow from such neglect; while the carrier is not an insurer of the absolute safety of the passenger, it does, however, in legal contemplation, undertake to exercise the highest degree of practicable care to secure the safety of the passenger and is responsible for the slightest neglect to exercise such care directly resulting in injury to the passenger, if the passenger is, before and at the time of the injury, exercising ordinary care for his or her own safety."

This instruction has repeatedly been approved by our Supreme Court. The West Chicago Street Railroad Co. v. Gromshinsky, 185 Ill. 92; Chicago City Railway Co. v. Bundy, 210 Ill. 39, 49; Chicago City Railway Co. v. Smith, 226 Ill. 178, 182; Chicago City Railway Co. v. Shreve, 226 Ill. 530, 539.

In the latter case the instruction as there given was criticised in that it limited the degree of care required of the defendant to such care as was "reasonable under the circumstances" instead of "consistent with the practicable operation of its street car line." Commenting on this instruction, the court says, "In this case the jury were repeat-

the property of the State of Mississippi. The report further stated that the property was located in the State of Mississippi and was located in the State of Mississippi.

to see what he thought about the situation.

Volume 1, No. 1

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OTHER COUNTRIES: 100 Brook Hill Drive, Secaucus, N.J. 07094

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edly informed by instructions given on behalf of the appellees ^{care} that it was bound to use only such ^{care} as was consistent with the practicable operation of its street car line. * * * It has been repeatedly held by this court that where an instruction does not direct a verdict or amount to such direction it may be supplemented by other instructions in the case and that where in such case the instructions, when considered together and as a whole, correctly state the law upon a given subject an omission in any one instruction in the series will be cured if the instructions, as a series, are correct."

The defendant further contends that the trial court erred in giving the tenth instruction which was as follows:

"10. The court instructs the jury that in determining on which side is the preponderance of the evidence, you are not to consider alone the number of witnesses testifying for the respective parties. You are further instructed to consider that each party is entitled to every admission made by the witnesses called on behalf of the opposing party, which in your judgment may have weight or bearing in support of his contentions."

None of the cases called to our attention in support of this contention are in point. This instruction did not tell the jury that the preponderance of the evidence is not alone determined by the number of witnesses testifying, nor that it does not consist alone in the number of witnesses testifying as was the situation in all the cases cited, but it tells the jury that in determining on which side is the preponderance of the evidence they are not to consider alone the number of witnesses testifying. The giving of this instruction cannot be considered as error.

As to the defendant's further contention that the judgment of the trial court should be reversed because of a variance, it need only be noted that it is both alleged in the

declaration and proved by the evidence that the collision occurred on Lincoln avenue at the point where the structure of the Northwestern Elevated Railroad crosses that street. It is immaterial that the declaration refers to that point as being between Bradley Place and Grace Street, whereas the evidence shows that it is between Waveland avenue and Patterson avenue. These are succeeding intersecting streets on Lincoln avenue, it being one block from Addison street to Waveland avenue, with Patterson avenue coming into Lincoln avenue from the west between those two streets, and one block from Waveland avenue to Grace street, with Bradley place intersecting Lincoln avenue between those two streets.

This brings us to the main contention of the defendant, namely, that the verdict is manifestly against the preponderance of the evidence and that the judgment of the trial court should be reversed for that reason. The principal point of controversy in the facts, as presented at the trial, was as to whether or not the motorman operating the car in question became aware of the danger presented by the actions of the horse at such a time as to enable him to avoid the collision by the exercise of a proper degree of diligence. This involved the question of just where the horse was when he gave evidence of fright and reared up, prancing over onto the space occupied by north bound cars, and just where the car was at that time, and further as to the point at which the car and the horse came together. It seems clear that the car was traveling at a speed of from 10 to 12 miles an hour. The principal witnesses who testified about the occurrence on behalf of the plaintiff were Kosciak, the driver of the first brick wagon, and Nieman, the driver of the second brick wagon. They both testified that the horse began prancing

about and rearing up just as the first team was about to pass under the elevated structure from the northwest and that at that time the car was coming up the incline, and, at other points in their testimony, they stated that at that time the car had not yet reached Patterson avenue. This would put the car from 200 to 300 feet away from the team at this time. These witnesses further testified that the collision took place near the east side of the elevated structure. They were corroborated in this by another witness who was a relative of the plaintiff. Nieman testified that when the horse in question first began to prance about and rear up he immediately pulled his team out of the car tracks and came up from behind the wagon being driven by Koseich and was about along side Koseich when the collision took place. Nieman's wagon had a load of about 2000 brick on it so it took an appreciable amount of time for this movement by his team. According to these witnesses, the horse in question must have proceeded about sixty feet from the place at which it first began to prance about to the point at which the collision took place, and the testimony is that the team did not proceed faster than a walk.

The testimony given by defendant's witnesses was to the contrary. As to the facts having to do with the situation preceding the collision, the witnesses of the defendant consist in the motorman of the car in question, the motorman of the following car (which was approximately 150 or 200 feet to the southeast), two men who were on the front platform of the car in question, and a passer-by on the sidewalk. The general purport of their testimony was to the effect that the car was 15 or 20 feet from the horse when it first reared up and that up to that time there had been no indica-

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It will be seen generally that the response becomes very different

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tion of any danger. One of the defendant's witnesses who was on the front platform, however, at one point in his testimony makes the statement that when he first saw the horse prance and rear, the car in question was about at the top of the incline.

If the jury believed the witnesses who testified for the plaintiff on these important points, then they were justified in finding the defendant guilty, for the inevitable conclusion to be drawn from the testimony of those witnesses is that if the motorman had been in the exercise of the proper degree of care and caution, he had full opportunity to avoid the collision, after becoming aware of the presence of the danger. It is apparent that the jury disregarded the testimony of the witnesses for the defendant to the effect that the car was too close to the horse when the first evidence of danger presented itself to make it possible for the motorman to avoid the collision. And, in view of all the testimony in the record, we cannot say that the jury were not warranted in the course they took. Upon a careful consideration of all the evidence, we are of the opinion that the verdict rendered is not manifestly against the weight of the evidence.

Finding no material error in the record, the judgment is affirmed.

AFFIRMED.

tion of my family. One of the witnesses, however, who
was on the first night, in 1904, at the time of his
testimony, stated that he did not see the
person named as being the one in question at about 11
the top of the stairs.

It was only believed the witness who testified
for the Ministry as these important points, that they were
testified in finding the defendant guilty, for the defendant
testified to the fact that the testimony of these witnesses
is that it was the defendant and that in the evidence of the
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with the defendant, after having been of the witness
of the witness. It is suggested that the fact distinguished
the testimony of the witness for the defendant to the
effect that the man was the same as the man when the first
witness in 1904 testified itself to have been the same man
the witness to avoid the defendant. Now, in view of all
the testimony in the record, it cannot be said that the fact
were not concerned in the source they took. With a careful
consideration of all the evidence, we are of the opinion that
the witness is not a witness, and the witness is not a witness.

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THE WITNESS IS NOT A WITNESS.

THE WITNESS.

233 - 23254

A. ANDERSON DECORATING CO.,
a corporation,

Appellee,

vs.

NELS GROSS,

Appellant.

210 I.A. 97

APPEAL FROM

MUNICIPAL COURT, .

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of
the court.

This was a suit brought by A. Anderson Decorating Co., a corporation, appellee, hereinafter referred to as the plaintiff, against Nels Gross, appellant, hereinafter referred to as the defendant, to recover for services rendered and materials furnished in decorating an apartment in a building owned by the defendant. The case was heard by the trial court without a jury and the court found the issues for the plaintiff and entered a judgment against the defendant for the sum of \$265.70, from which judgment the defendant has appealed.

The defendant contends that the judgment should be reversed because it is against the weight of the evidence. The testimony is flatly contradictory, witnesses for the defendant testifying that the workmanship in the apartment which was done by the plaintiff was far from being up to the grade of workmanship in the apartment of a Dr. Waitland in the same building, contrary to plaintiff's agreement, and these witnesses further testified to numerous specific defects which were present. Anton Anderson, president of the plaintiff company, testified that the workmanship in the

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apartment done by the plaintiff was as good as that in the apartment shown him (the Dr. Maitland apartment) and he and his witnesses in rebuttal denied the presence of each and every one of the specific defects which had been testified to by the defendant and his witnesses. The witnesses who corroborated the defendant as to the presence of the alleged defects were a real estate agent employed by the defendant to manage the building which contained the apartment in question, the janitor of the building, and an apartment broker who had handled apartments in this and other similar buildings, the real estate agent and the broker testifying that they had had considerable experience with this class of work. The witnesses who corroborated the plaintiff in his contention that the workmanship involved was good and that there were no such defects as testified to by the defendant and his witnesses were a painter and decorator employed by the plaintiff, a decorating contractor who inspected the work in question at the plaintiff's request about two weeks after it was completed, and after it became apparent that the plaintiff was going to have trouble about the work, and a wall paper and paint salesman for the concern which had furnished the wall paper used for this job, who visited the job during the progress of the work on receipt of a notice from the plaintiff that they were having trouble with the paper furnished in one of the bedrooms.

There was another sharp conflict in the testimony in the matter of the contract price, Anderson testifying that his agreement was to do the work for \$190 with all wall paper extra, while the defendant testified that the price of \$190 was to include the paper. The real estate agent corroborated the defendant on this point, testifying to a conversation had

with Anderson in which the latter is alleged to have said that the contract called for all work and materials, including paper, to be furnished for \$190. Anderson testified that he had mailed the defendant a bill for \$190 containing a notation that paper bills would follow, which bill had been returned together with a letter in which defendant complained about the workmanship but said nothing to the effect that the price of \$190 was to include the paper. The defendant denied receiving the bill or writing the letter. Anderson, at a subsequent session of the court, produced the bill and the letter which was to the effect testified to by him.

In such a case as this much depends on the manner in which the witnesses testified, their appearance on the stand, and such kindred matters as the trial court is in a position to observe but which cannot be shown by the record. In this state of the record, it does not seem reasonable for us to say that the trial judge was not warranted in finding that the evidence showed a preponderance for the plaintiff on the issues involved.

The defendant further alleges that the trial court erred in sustaining plaintiff's objection to the introduction of several photographs in evidence which were alleged to demonstrate and illustrate some of the defects which the defendant claimed existed in connection with the work done by the plaintiff under the contract in question. The defendant offered these photographs in reply to the plaintiff's rebuttal testimony. The ruling of the trial court was correct as they were not proper rebuttal testimony. The plaintiff had brought no new matter into the case in its rebuttal but had merely denied the existence of each and every defect which had been

testified to by the defendant and his witnesses.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Approved: _____ Date: _____

Witness my hand and seal this _____ day of _____

VICTOR P. FRANK, Administrator,
Estate of Julius Frank, Deceased,

210 I.A. 98

Appellee,

APPEAL FROM

vs.

MUNICIPAL COURT

OF CHICAGO.

GARRETT W. WOODWARD, and FRED
MILLER BREWING CO., a corpora-
tion, on appeal of FRED MILLER
BREWING CO., a corporation,

Appellant.)

MR. JUSTICE THOMSON delivered the opinion of
the court.

This is an appeal from a judgment finding the
right of property in Victor P. Frank, Administrator, the
appellee, hereinafter referred to as the plaintiff, in a
replevin suit. The Fred Miller Brewing Company was a co-
defendant with Garrett W. Woodward in the trial court, the
latter having been defaulted before the trial of the case.
The Brewing Company appealed from the judgment of the trial
court. We will hereafter refer to it as the defendant.

So far as they are necessary to a decision of
the merits of the case, the facts involved are as follows:
Julius Frank, and Louis Frank, his brother, were the pro-
prietors of a saloon and the owners of the premises in which
they had conducted it for some years. Since the controversy
on which this action is based arose, Louis Frank assigned
his interest to Julius Frank, and subsequent to that time
the latter died and the present plaintiff is administrator

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the matter of the case, the facts involved are as follows:

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His interest in John Deere was apparent in that time

referred to as the "Bosnian genocide" and was widely reported in the media.

of his estate. The Franks entered into two contracts with Garrett W. Woodward on the same day. One was a bill of sale by which, for a consideration of \$9,800, the Franks sold and conveyed to Woodward the liquors, tobacco and stock on the premises in question, together with the good will of the saloon business. This contract expressly excepted therefrom the saloon fixtures in the premises. The other contract was an agreement by the Franks to lease the premises to Woodward, and such written lease was executed by the parties three days later. In addition to the premises in which the saloon was conducted, this lease covered the saloon fixtures and as to these fixtures the lease provided as follows:

"Tenth: It is hereby stipulated by and between the parties hereto that if each and all the terms and conditions and covenants mentioned in this lease shall be kept and performed by said party of the second part, and all moneys therein provided to be paid are promptly paid by said party of the second part, as rental, and all taxes and charges of any nature whatever made against said business, are promptly paid and the license for said business during the term of said lease is promptly paid, then to encourage said party of the first part to replace or repair and to keep in good condition all the present property on said premises rented by said parties of the first part, to said party of the second part under and by virtue of the terms of said lease, and thereby afford the parties of the first part assurance that all rentals will be promptly paid and the covenants of said lease kept, it is hereby agreed that at the termination of said lease, said parties of the first part will upon the expiration of this lease, in consideration of the payment to them of the sum of one hundred dollars convey to said party of the second part all their right, title and interest in and to all personal property which may at the termination of the said lease be upon said premises and belonging to said parties of the first part should said party of the second part elect to purchase said property upon said terms during the period between the second and fifteenth days of April, A. D. 1923, but time, however, is the essence of this option to purchase."

Six months after the lease was entered into, Woodward, the lessee, assigned all his right, title and interest in the lease to one Thie and all conditions of the lease, including the payment of rent, were complied with for the first two years of the term covered by the lease. At the time Woodward leased these premises and purchased the stock and good will of the business, he borrowed \$10,000 from the defendant, Fred Miller Brewing Company, and, to secure his notes to the brewing company, he executed a chattel mortgage of certain property, including his interest in the lease in question. When Thie defaulted in the payment of the rent, a bankruptcy petition was filed against him and at this time a month's rent was paid the plaintiff by the defendant. Shortly after the institution of the bankruptcy proceedings against Thie, his trustee in bankruptcy disposed of all his interest in and to all the personal property on the premises, exclusive of the fixtures in question. On the day of this sale, the defendant brewing company posted notice of foreclosure sale under their chattel mortgage, and also on the same day Julius Frank purchased all the right, title and interest of the trustee in bankruptcy of Thie in and to the saloon fixtures. While one of the attorneys representing the defendant was on the premises, a representative of the Franks made a demand on him for the saloon fixtures, which was refused, and thereupon the plaintiff started this replevin suit. The defendant made two tenders of \$100 to the plaintiff, being the balance of the amount to be paid under clause 10 of the lease, and there is some conflict in the evidence as to whether or not one of these

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tenders was made before the replevin suit was started. When the replevin writ was served, the fixtures were in the possession of the custodian who had taken possession under the foreclosure proceedings instituted by the defendant.

The defendant contends that the finding of the trial court that the right of property in the saloon fixtures was in the plaintiff should be reversed because, under the terms of the tenth clause of the lease, its mortgagor, who was the lessee, was entitled to buy the fixtures by paying \$100 at the expiration or termination of the lease, and that it, as mortgagee of the leasehold, possessed the same right, and that it exercised this right by tendering the plaintiff \$100 previous to the termination of the lease between the plaintiff and Woodward, which took place at the time the plaintiff took possession of the saloon fixtures under the replevin writ. With this contention we cannot agree. The defendant, as mortgagee of the leasehold interest, acquired such rights as the lessee had in the premises and no more. Kalauley v. Doe, 150 Ill. 311. Under the provisions of the tenth clause of the lease, the lessee was given the right to exercise the option to purchase the saloon fixtures, provided, first, that he performed all the covenants and conditions of the lease, including the payment of the rent, when due, and all charges made against the business, including the renewals of the license during the ten year period covered by the lease, and, second, that he elected to purchase said fixtures and made a final payment of \$100 during the period between the second and the fifteenth days of April, A. D. 1923, and, as to this option, the contract adds, " - - but time, however,

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is the essence of this option to purchase.⁹ The defendant has argued that when it made its tender of \$100 to complete the sale of these fixtures it was exercising a right which the lessee had under the terms of this lease. This is not the case, even if the tender occurred before the replevin suit was started. Under the terms of the lease, the lessee was given no right to purchase the fixtures by the payment of \$100 until after all conditions precedent and incumbent upon him under the terms of the lease had been complied with. Under the language used in the lease he had no right to purchase the fixtures even if he continued to pay the rent when due and complied with all the other conditions of the lease, until after April 2, 1923, and when he defaulted in the payment of rent, or when such default was made by his assignee, all right to exercise the option to purchase was lost by him and also by his assignee. Underhill: Land-Lord & Tenant, Vol. 2, p. 991, 992; 1 Pomeroy: Equity Jurisprudence, Section 455; Carpenter v. Thornburn, 89 S. W. 1047. This would be true even if the lease had provided that this option to purchase and the payment called for in making the purchase was to be made at the expiration of the term created by the lease, without mentioning any dates, for it has been held that such a clause does not mean the date when the term was brought to an end by the foreclosure. Underhill: Land-Lord & Tenant, Vol. 2, p. 937. But the lease in question goes further than that and specifies that the right in question, if exercised at all, is only to be exercised during the period from April 2 to April 15, 1923, and time is made the essence of the contract. This may not have been a particularly advantageous contract to enter into from the standpoint of the lessee, but he did enter into it, and its terms

In the event of total liquidation of the company, the assets of the company shall be sold and the proceeds thereof shall be distributed to the holders of the shares in proportion to the number of shares held by them. The company shall not be liable for the debts or liabilities of any shareholder, and no shareholder shall be liable for the debts or liabilities of the company. The company shall not be bound by any contract or agreement made by any shareholder, and no shareholder shall be bound by any contract or agreement made by the company. The company shall not be bound by any contract or agreement made by any shareholder, and no shareholder shall be bound by any contract or agreement made by the company. The company shall not be bound by any contract or agreement made by any shareholder, and no shareholder shall be bound by any contract or agreement made by the company.

are ~~not~~ specific and the courts cannot alter them. The defendant took its mortgage with full knowledge of the rights of the lessee in the premises and therefore it also lost all right to purchase the fixtures under the terms of the lease when default was made in complying with the terms of the lease by the lessee and assignee. Walkau v. Manitowoc Seeding Co., 105 Ill. App. 130; Jones v. Glathart, 100 Ill. App. 630; J. W. Kimball Co. v. Crookshank, 123 Ill. App. 580; Zacharia v. M. C. Cohen Co., 119 N. W. 136; Forbes Piano Co. v. Reynolds, 56 Southern 270. Therefore the defendant acquired no rights by its tender of \$100 to plaintiff, whether that tender was made before or after the institution of this suit.

It follows that, at the time the defendant foreclosed its chattel mortgage, it had no right to include the saloon fixtures in that foreclosure and its possession of these fixtures was not a legal possession. Therefore there was no necessity of any formal demand upon them for the return of the fixtures before the institution of the replevin suit. Where one purchases or takes a mortgage on personal property in good faith from one who proves not to be the owner of the property, a demand must precede the institution of the replevin suit against him by the owner, but this is not the case where one purchases or takes a mortgage on personal property from one whose rights to the property are conditional and where the one purchasing or taking the mortgage has notice of the conditions. Kulms v. Gates, 92 Ind. 66.

Finding no error in the record, the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

MR. PRESIDING JUSTICE TAYLOR took no part in this decision.

J. M. GRACE,

Appellee,

vs.

FRANK G. WRIGHT & COMPANY,
a corporation and D. F.
Reid,

Appellants.

210 I.A. 104

APPEAL FROM

SUPREME COURT,

COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action for fraud and deceit brought by J. M. Grace against Frank G. Wright & Company, D. F. Reid, and one other as to whom the trial court directed a verdict of not guilty. The jury found the issues for the plaintiff and assessed his damages at \$2814.00 and judgment was entered on the verdict, against defendants named, from which they have appealed.

Wright & Company were dealers in commercial paper. Reid was in their employ. They were engaged in selling an issue of preferred stock of the Advance Radiator Company. Reid talked with the plaintiff as a possible investor, giving him a prospectus containing a statement of the financial affairs of the Radiator Company. While this statement seems to have been a correct representation of the items included therein, as they appeared on the Radiator Company's books, there is evidence which would warrant the jury in believing that many of them were wholly without foundation and so known to be by Reid when he made up the prospectus at the time he investigated the company's affairs with a view to undertaking

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the sale of a preferred stock issue. The plaintiff testified that Reid told him that the Radiator Company was in splendid financial condition and earned, during the previous year, over 40% net on the money invested; that Wright & Company had sent auditors down to the offices and plant of the Radiator Company, who had thoroughly examined its books, and that everything was absolutely all right; that Wright & Company dealt in nothing but the highest class of securities and that this was one of the finest investments they had ever handled. There was evidence further warranting the belief that all these representations, so far as they referred to the Radiator Company, were false and either known to be such by Reid at the time he made them, or that, in the exercise of a proper degree of care, he should have known they were false. Although the evidence shows that the plaintiff visited the plant of the Radiator Company at Reid's suggestion, and that the books were available for such examination as he cared to make, the plaintiff testified Reid assured him it was absolutely useless to investigate the books or anything else because they had been gone over so thoroughly, and he relied on this assurance. In view of all the circumstances, as disclosed by the evidence, we believe the jury were warranted in considering that he was justified in so doing.

Believing these false representations to be true, the plaintiff closed a contract with the Radiator Company whereby he purchased preferred stock of the par value of \$5000, giving therefor \$2000 in cash and the balance in notes, and entered the employ of the company at a salary of \$150.00 per month, half of which was to be retained each month and applied on the notes. A few months later the company had

an annual meeting and the plaintiff then discovered that the company was running behind and not doing enough business to keep on its feet. Plaintiff testified further that, after making his investment, he discovered that many of the statements contained in the prospectus referring to the company's assets were without foundation and that the percentage of its earnings on the money invested, during the previous year, was not such as the defendants had represented. After two or three more months, without any improvement in the company's affairs, the plaintiff withdrew, and demanded the return of his money and notes. He testified that the notes were returned to him but that he never received any part of the cash he had invested and that his efforts to effect a settlement with the Radiator Company were fruitless.

While there is conflict in the evidence, we believe the jury were warranted in finding the issues for the plaintiff, and that the trial court did not err in overruling defendants' motion to direct a verdict in their favor as to the last two counts, as contended by them.

The plaintiff testified that one of the men with whom he tried to effect a settlement at the time of leaving the company was one Des Jardiens, then vice president of the company. The latter was a witness for the defendants and, in the course of his examination, counsel asked him several questions about the alleged efforts of the plaintiff to secure a settlement of his affairs with the Radiator Company through the witness; - as to whether the witness had had any conversations with the plaintiff relating to a repurchase of his stock by the Radiator Company, and, if so, what those conversations were. The court sustained objections

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interposed by the plaintiff to all these questions. While this evidence was material, and admissible, we think the error in excluding it was not such as to warrant a reversal of the judgment.

The position of the defendants is that if the Radiator Company entered into a new contract with the plaintiff whereby it agreed to take back his stock and return his money, but failed to carry out the terms of that contract and thus make good such financial loss as the plaintiff may have suffered as a result of his reliance upon the false representations of the defendants, his present position should not be attributed to the fact that he invested in reliance upon those false representations but to the fact that the Radiator Company has failed to carry out its contract to refund his money, and that the plaintiff cannot recover in this action unless he shows that he has made a proper effort to enforce compliance to the terms of that contract with the Radiator Company and failed. Such a position is wholly untenable. Any arrangement made by the plaintiff with the Radiator Company looking toward a return of his money could have no effect whatever upon his right to recover from these defendants in this action except in as far as it might effect his measure of damages. The defendants did not show nor offer to prove, nor is it contended by them that any part of the money paid out by the plaintiff has been returned to him.

The defendants complain of two instructions given to the jury which were to the effect that they were to find the issues for the plaintiff if they believed from the evidence that the defendants made the representations and statements con-

tained in the declaration and that the same were false or fraudulent and were made with the intent, as therein alleged, and that the plaintiff, relying upon the said representations and statements was thereby induced to buy stock or part with his money. The defendants contend that the giving of these instructions was error in that they did not require the jury to find from the evidence that the alleged false representations were of such character or made under such circumstances as to justify a reasonably prudent person in believing them to be true and directing his conduct accordingly, citing Schwabacker, v. Kiddle, 99 Ill. 343, where the court held the giving of a similar instruction was error in that it omitted the element here contended for, saying that its presence was essential to recovery, "unless he (the plaintiff) has been thrown off his guard by the other party." Without going into detail, we believe it is clearly shown by the evidence in the case at bar that such was said and done by the defendant Reid to throw the plaintiff off his guard and that it did have that effect. Although the defendants were the agents of the vendor of this stock, we do not consider that the relation between the parties hereto was strictly that of vendor and vendee. There is much in the correspondence between Reid and the plaintiff, and in their conversations, which gives the impression and would warrant the plaintiff in believing that Reid was endeavoring to drive a good bargain for the plaintiff and was protecting his interests rather than those of the Radiator Company. Reid's position was not solely that of agent for the seller of the stock but he held out to the plaintiff that he himself was a prospective buyer. Under all the facts, as disclosed by the evidence, we believe Endsley v. Johns, 17 Ill. App. 466, affirmed

120 Ill. 469, approving such an instruction as is complained of here, to be an authority in point. Unless the facts justified it, an instruction that the plaintiff cannot recover unless the statement relied upon was such as was calculated to deceive a person of reasonable prudence may be misleading. 20 Cyc. 129. The giving of such an instruction was held to be error in John V. Farwell Co. v. Nathanson, 99 Ill. App. 185, under the facts there involved.

The defendants further contend that the trial court erred in giving to the jury an instruction reading as follows:

"If the jury find for the plaintiff, and that the defendants are guilty of the fraud and deceit charged in the declaration, then, in estimating the damages, they may give the amount of the money paid by the plaintiff, according to the terms of the contract, together with interest to this date, together with such sum as will indemnify the plaintiff for all damages directly sustained by him by reason of the misconduct of the defendants, including such exemplary damages as the jury may think the circumstances may warrant by way of punishment of the defendants for the fraud and deceit and of example to the community."

Complaint is made of this instruction for several reasons. It is contended that the evidence did not warrant the giving of an instruction on exemplary damages. We think it was not error to include this subject in the instructions. It was within the province of the jury to award punitive damages if they found the issues for the plaintiff. It is apparent they did not include such damages in their verdict. The defendants contend that, notwithstanding this fact, the mere giving of an instruction on that subject prejudiced them in the eyes of the jury. In view of all the evidence, we believe it had no such effect. The defendants complain, further, of this instruction that, although it may set forth

a proper measure of damages under the facts in James v. Morgan, 237 Ill. 360, from which the instruction was taken, it does not conform to the proper rule as to the measure of damages in such a case as the one at bar, citing Schwitters v. Springer, 236 Ill. 271, which holds that, in an action for fraudulent representation in the sale of property, the measure of damages is the difference between the value of the property as it is and what it would be if the representations had been true. That is the correct rule for measuring the damages where the plaintiff affirms the contract into which he has been induced to enter and retains the property he has purchased under it, but the law also gives him the right, under such circumstances, to rescind the contract, and, in that event, in such an action as this, his measure of damages is the consideration paid together with such sum as will indemnify him for such damages as he may have directly sustained as a result of the alleged deceit. In view of all the facts in this case, we think the giving of this instruction was proper. The same instruction was approved as applied to the facts involved in the case of Crane v. Schaefer, 140 Ill. App. 647, which cites James v. Morgan, supra, as authority for the ruling.

The defendants are correct in their contention that the instruction last referred to should have limited the damages to be awarded, if any, to such as were proven or shown by the evidence. However, the error in omitting this element from the instruction would not warrant a reversal of the judgment as the amount of damages the jury did award was fully warranted by the evidence.

The same is true of that part of the instruction referring to interest. Although the instruction might better have specified the rate of interest that the jury were to take into consideration, if they awarded interest, the instruction, as given, contained nothing that would warrant the jury in inferring that interest was to be computed at anything beyond the legal rate. The defendants further complain of a modification of one of their instructions by the court and the refusal of other instructions tendered by them. As to the instruction modified, an examination of the instructions given by the court discloses the fact that the subject-matter of the clause stricken out was included in the given instructions; and, as to the instructions refused, no error was involved inasmuch as their subject-matter, in the case of some of them, was not applicable to the facts or issues involved, and, in the case of others, was included and fully covered by the given instructions.

Finding no error in the record, the judgment of the Superior Court is affirmed.

AFFIRMED.

302 - 23268

CITY OF CHICAGO,

Appellee,

vs.

MRS. HENRY WAHL,

Appellant.

210 I.A. 106

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

210 I.A. 106

MR. JUSTICE THOMSON delivered the opinion of the court.

The defendant was arrested and charged with making, aiding, countenancing and assisting in making an improper noise, disturbance, breach of the peace and diversion tending to a breach of the peace in violation of Section 2012 of the Revised Municipal Code of Chicago. She waived a jury, and, upon the trial before the court, was found guilty and fined \$1.00. By this appeal it is sought to have this judgment reversed.

We must assume the sufficiency of the evidence to support the charge made for the reason that there has not been preserved for our review the ordinance which the defendant is charged with having violated. We have repeatedly held that, in the absence of the ordinance, we must presume the correctness of the finding of the trial court. City of Chicago v. Tearney, 187 Ill. App. 441; City of Chicago v. Moran, 192 Ill. App. 57; City of Chicago v. Kohn, 195 Ill. App. 399; City of Chicago v. Leaser, 196 Ill. App. 37; City of Chicago v. Richardson, 197 Ill. App. 594; City of Chicago v. Simonetti, 204 Ill. App. 164.

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For the reasons given, the judgment must be affirmed.

AFFIRMED.

RUTH WHITNEY by Arthur Whitney,
her next friend,

Appellee,

vs.

FRANK M. DERBY and WILLIAM M.
DERBY, JR.,

Appellants.

210 I.A. 107

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

MR. JUSTICE THOMPSON delivered the opinion of
the court.

This was a suit brought by Ruth Whitney, appellee, hereinafter referred to as the plaintiff, against Frank M. Derby and William M. Derby, Jr., appellants, hereinafter referred to as the defendants, for damages alleged to have been sustained by the plaintiff when a stone balustrade on the front steps of a building, in which her father was a tenant and which was owned by the defendants, fell on her, injuring her left leg and knee.

This case was first tried in the year 1914, resulting in a verdict for the plaintiff for \$1250.00, \$600.00 of which was remitted by the plaintiff on the motion for a new trial, whereupon the motion was overruled and judgment entered against the defendants for \$650.00. The defendant prayed an appeal to this court and the judgment was reversed and the cause remanded. Whitney v. Derby, 197 Ill. App. 309. Upon the second trial of the case, the jury returned a verdict against the defendants for the sum of \$1,000.00 and the case is again before this court on an appeal from that judg-

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ment.

The plaintiff was a child a few weeks less than eleven years of age. The defendants were the owners of a two-flat building in which the plaintiff's father was a tenant. On each side of the front steps leading up to the front entrance of the building there was a large stone balustrade, six inches in width, the top of which was horizontal and level with the floor of the front porch, and the front edge of which was vertical, extending down to the bottom step. Each balustrade was in the general form of a right-angle triangle, the top and front edges being the right angle sides of the triangle, and the hypotenuse being made up of that part of the balustrade which rested upon the successive steps, the points of contact on each step extending for the width of the balustrade, and a distance of about nine inches in the direction of the balustrade. These large stones were held in position by means of cement. The declaration alleges that one of these stone balustrades became loose and that the defendants were aware of its dangerous condition, notwithstanding which they permitted it to remain as it was; and that, while the plaintiff was in the exercise of proper care for her own safety, and was upon the steps, the balustrade fell or toppled upon her and injured her leg. There is evidence in the record tending to show that one of the balustrades at the entrance in question had become loosened, as alleged, and was in some danger of falling over and thus injuring one who might happen to be near it at the time, and that, on the day in question, the plaintiff, having returned from school, was out on the front steps with a girl companion and took hold of this balustrade and began to move it back and forth, swaying it a little further each

time, and after she had moved it back and forth five or six times, that it fell over against her and injured her leg. The defendants urge that there is a fatal variance between the declaration and the proof, but, in our opinion, this is not the case.

Further, we have no doubt, from the testimony, that this balustrade was in a dangerous condition, and, although there is a direct conflict on this point, we think the evidence clearly shows that the defendants had been specifically advised of its condition and that they thus knew of it and had assured the plaintiff's father that they would have it taken care of. Although it appears that plaintiff's father had warned her to keep away from this balustrade, because of its dangerous condition, it is the opinion of a majority of this court, although not that of the writer, that, under all the circumstances of the case, her conduct did not amount to contributory negligence. This dangerous condition had to do with the entrance to the house where she lived and she doubtless had occasion to be upon these front steps several times a day where this balustrade was within arm's reach. Child-like, the very knowledge she had that the stone would move tempted her to move it, and the fact that she had, as she states, on a number of previous occasions moved it back and forth, without harm to herself, confirmed her in the belief that she could continue to do so. The knowledge which the defendants must have had that this young girl had daily occasion to pass and be about this stone in its dangerous condition added to the duty which they owed her upon being advised of the condition the stone was in.

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It is further urged that the verdict was excessive. Although the physician who treated her testified that he examined her injured knee just previous to the second trial of the case and found it the same size as the other knee, and normal in appearance, we are not inclined to believe that the verdict was excessive in view of all the circumstances. The doctor was asked whether or not the limb was permanently injured, and, in reply to that question, he stated that he did not believe that "any joint that is injured as severely as that joint was will ever fully recover, that is, to the extent that it will be just as strong and resistant to disease as if never injured."

For the reasons stated, the judgment of the trial court will be affirmed.

AFFIRMED.

MR. PRESIDING JUSTICE TAYLOR:

In such a case as this the chief difficulty arises in undertaking to determine what amount of care should be required of a child under such circumstances. Of course, we are not in as satisfactory a position as the jury was in determining that question. The physical situation, as it appeared to the child, probably was especially inviting. The oscillation of a large stone further excitement and pleasure; and, as she had done it on numerous former occasions without injury, her experience may have seemed to justify her, in her own opinion, that her father and others who warned her were in error, and, as the jury heard the evidence, and saw her, and heard her testimony, it evidently concluded that she was not chargeable with contributory negligence.

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I do not feel justified in deciding otherwise.

334 - 23300

ILLINOIS FLOWER BOX CO.,
a corporation,

Appellee,

vs.

WILLIAM R. DUNN,

Appellant.

210 I.A. 113

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is a fourth class action which was begun in the Municipal Court of Chicago. In the amended affidavit of merits, it is alleged that the plaintiff's claim is for rent of desk space and telephone expense "due the plaintiff" as per itemized statement attached, which was furnished to the defendant by certain named individuals who were described as co-partners, trading as the Illinois Flower Box Co., and the plaintiff further alleges that the said co-partnership assigned, transferred and set over to the plaintiff corporation all their right, title and interest to the account in question on or about March 30, 1916, at which time the Illinois Flower Box Co. was incorporated under the laws of the State of Illinois. Attached to this statement of claim is the affidavit of one Armand Prete to the effect that he is the agent for the plaintiff in this cause and that the nature of the plaintiff's demand is as stated in the foregoing statement of claim and that "there is due to plaintiff from the defendant" the sum of \$124.75. The trial was had before the

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court without a jury and the court found the issues for the plaintiff and assessed its damages at the sum of \$140.00 Judgment was entered for that amount, from which judgment the defendant has appealed.

No bill of exceptions was ever filed in this case and there is none in the record. The only point urged by the defendant in this appeal is that the statement of claim does not set forth a cause of action inasmuch as it fails to allege that the plaintiff is the actual bona fide holder of the chose in action which was assigned to it by the former partnership.

Section 18 of Chapter 110 of Illinois Statutes provides that "The assignee, and equitable and bona fide owner of any chose in action not negotiable, heretofore or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title." The amended statement of claim in this case sets forth when and how the corporation acquired its title to the chose in action in question. This is a fourth class action in the Municipal Court where no formal written pleadings are required. The affidavit filed in connection with the statement of claim states, as does the statement of claim itself, that the debt upon which the chose in action is based "is due to plaintiff", which, in such an action as this, we hold to be a sufficient compliance with the statute. If the debt in question is owing to the plaintiff at the time the affidavit to that effect is made, necessarily the plaintiff must at that time have been the bona fide holder thereof.

There being no error in the record,
the judgment of the Municipal Court is affirmed.

AFFIRMED.

THE FBI REQUESTED THE SEARCH BECAUSE THE INDIVIDUAL WAS BELIEVED TO BE
 INVOLVED IN THE RECENT MURDER OF MARTIN LUTHER KING, JR.
 THE SEARCH WAS CONDUCTED BY THE FBI AND THE RESULTS WERE
 FURNISHED TO THE FBI ON 1/15/68.

The above information was obtained from the files of the Bureau of Investigation, Department of Justice, Washington, D.C., and is being furnished to you for your information.

[illegible]

HELEN WARREN, a minor, by
John Warren, her next friend,

210 I.A. 114

Appellee.

APPEAL FROM

vs.

CIRCUIT COURT,

CHICAGO CITY RAILWAYS COMPANY,

COOK COUNTY.

Appellant.)

MR. JUSTICE THOMSON delivered the opinion of
the court.

This is an appeal from a judgment of \$500 in
an action on the case, for personal injuries. In urging
this court to reverse the judgment, the defendant alleges
that the trial court erred in not directing a verdict,
because the evidence fails to establish negligence on
the part of the defendant and also because it did estab-
lish negligence on the part of the plaintiff, proximate-
ly contributing to her injury.

The declaration charges negligence on the part
of the defendant in operating its car at a high, dangerous
and excessive rate of speed and without ringing any bell.
At the time of the accident, the plaintiff was between
9 1/2 and 10 years of age. The accident happened about
four o'clock on the afternoon of Sunday, September 14,
1913, within a few feet east of the east cross walk at the
intersection of Root street and Fifth avenue in the City
of Chicago. The car in question was an old style open
car about thirty feet in length. It was running east along

ILLINOIS

To continue our previous work, we will now consider the case where the system is subject to a constant force.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization.

THE following is a list of the names of the persons who have been appointed to the various positions in the various departments of the Government of the State of New York, for the year 1900.

the south track in Root street and had approached, passed and was just leaving the Fifth avenue intersection. The plaintiff, with her sister and another girl companion, thirteen and fourteen years of age respectively, was on the sidewalk on the south side of Root street, two doors east of Fifth avenue. The plaintiff left her companions to go to a store on the north side of Root street and a door or two east of the point at which she left the curbstone on the south side of Root street. As the plaintiff walked out onto the street, she did not look either to the east or west but was apparently intent upon the store to which she was going and kept looking in that direction. The car was running at a speed of about ten miles per hour, and, as the car passed the street crossing, there were no people on the street and no vehicles obstructing the car's progress. In such a situation a motorman cannot be said to be lacking in a proper degree of care in running his car at a speed of ten miles an hour, keeping in mind the rule that the law calls for a greater degree of care on his part at and near street intersections than it does in the middle of the block. With nothing to obstruct the plaintiff's view of the car, the motorman had no reason to believe that she would suddenly proceed across the street in front of him, and it was not in any way incumbent upon him to slow up in anticipation of such an unlikely possibility. If there had been vehicles or other obstructions in the south roadway, obstructing the view of persons on the South Side of Root street at or near the east cross walk, as a car was coming from the west, the situation would have been different. If the plaintiff was not running across the street, as defendant's witnesses

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testify, it is clear from the evidence that she was hurrying to accomplish her errand at the store across the street so as to "catch up" with her companions who had walked on in a westerly direction on the south side of the street. The question of just how many feet the car was from the plaintiff when she started to cross the street is not material. It is not disputed that from the moment she did start to cross the street, the motorman made every effort possible to stop the car and to avoid the accident, but, notwithstanding his efforts, the plaintiff walked into the car without seeing it, coming in contact with it either at the front corner of the car or within a few feet of the front of the car and falling back towards the curb-stone.

Although there is some conflict in the testimony about the ringing of the bell, it seems to preponderate in favor of the defendant, but we do not deem this question important. The ringing of the bell in the situation presented in this case is of minor importance. Even if the bell was not rung, it cannot be said that the failure to ring it was the proximate cause of the accident. As to the plaintiff, the motorman was under no duty to ring his bell, keeping in mind the situation as disclosed by this evidence. As he approached the point where the plaintiff and her companions were standing on the sidewalk, he was not nearing a street intersection; he was leaving one. There is a jog in Fifth avenue at this point and that part of Fifth avenue extending south from Root street is some 60 feet west of the part extending north from Root street, and the point at which the plaintiff stepped off the south curb-stone on Root street was approximately 40 feet east of the east line of Fifth ave-

nue on that side of the street. Even if the motorman saw the plaintiff start across the street in ample time to have stopped his car, there being nothing to obstruct her view, he had the right to assume that she would stop before crossing the track, and, up to the moment she left the curb-stone and he saw that she was intending to cross the street, he owed her no duty to ring his bell. He testified that he had rung the bell down in the middle of the block to the west as he approached Fifth avenue and that he again rang it the moment he saw her start to move across the street. Under this state of facts, it cannot be said that he was guilty of negligence. West Chicago Street R. R. Co. v. Schwartz, 93 Ill. App. 387, in which case a boy about 7 years of age was injured while passing diagonally across Twelfth street at or near the crossing of Wolden street; Rack v. Chicago City Railway Company, 69 Ill. App. 656, affirmed 173 Ill. 289, in which case a boy about 4 1/2 years old was injured in running across 35th street near the intersection of Kimbark avenue; Pigg v. Chicago Railway Company, 203 Ill. App. 293, in which case a girl about 5 years of age ran out into the street from the curb in North Clark street at the intersection of Locust street. In all these cases the speed of the cars causing the injuries was just about the speed of the car in this case.

As was stated by Mr. Justice Sears in West Chicago R. R. Co. v. Schwartz, supra. "This case does not fall within the class of cases where a child comes upon a railway track and remains there long enough to enable the driver of an approaching car, in the exercise of ordinary care, to see and avoid the peril. * * * There is no evidence of

negligent speed or that the motorman was looking elsewhere than at the street ahead and the track. * * * There was no occasion to ring a bell at that place unless the peril of someone on the street was to be anticipated." The court bases the latter statement on the fact that the place of injury was between crossings. It seems clear that there was less obligation upon the motorman in the case at bar to ring his bell than there was in the Schwartz case in view of all the evidence disclosed in that case.

For the reasons given, it is our opinion that the defendant is not proven by the evidence to be guilty of any of the acts of negligence charged against it and also that the plaintiff is proven to have been guilty of negligence which proximately contributed to her injury. Therefore the judgment of the Circuit Court is reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

FINDING OF FACTS:

The court finds that the defendant was not guilty of any of the acts of negligence charged against it in plaintiff's declaration and that the plaintiff was guilty of negligence which proximately contributed to her injury.

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MAUD WENTWORTH,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,

Appellant.

210 I.A. 116

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action brought by Maud Wentworth, appellee, hereinafter referred to as the plaintiff, against the Chicago City Railway Company, appellant, hereinafter referred to as the defendant, for personal injuries alleged to have been received in attempting to board one of the defendant's cars. The case has been tried twice, the first trial resulting in a verdict for the plaintiff for the sum of \$700.00 which verdict was set aside on the hearing of defendant's motion for new trial. The second trial resulted in a verdict for the plaintiff for the sum of \$500.00 on which the trial court entered a judgment from which the defendant has appealed.

The only point urged by the defendant in this court is that the verdict is against the manifest weight of the evidence. Where the evidence is conflicting and that of the plaintiff when taken alone is sufficient to support the verdict, this court will not usually set aside the verdict and reverse the judgment although the testimony of the

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... ..

plaintiff may be the only evidence supporting the verdict and there may be the testimony of several witnesses contradicting that of the plaintiff. This is especially true where the facts have been considered by two juries and both have found the issues for the plaintiff, as is the case here. However, even in such a case, this court will not hesitate to set aside the verdict and reverse the judgment where a careful examination of the record leads to the conclusion that the verdict and judgment are clearly against the manifest weight of the evidence. Brown Hoisting & Conveying Machine Co. v. Bennett, 96 Ill. App. 514; North Chicago Street Railway Company v. Canfield, 118 Ill. App. 383; Wolf v. Scully, 151 Ill. App. 263; Sertaut v. Crane Co., 172 Ill. App. 477; Nelson v. Chicago City Railway Company, 194 Ill. App. 615.

It is of course true that the plaintiff may be said to have established his case by a preponderance of the evidence although the plaintiff's evidence is the only testimony introduced by him, while there are a number of witnesses testifying for the defendant; and there are many cases to be found where the court has refused to disturb the verdict for the plaintiff in such cases, but, an examination will disclose the fact that in those cases the plaintiff was in some measure corroborated by one or more of the witnesses for the defendant or there were such contradictions in the testimony of the defendant's witnesses as to make their testimony more or less unreliable.

We have closely examined the evidence shown by the record in this case and we believe that the very clear preponderance of the testimony was against the plaintiff and in

favor of the defendant. The plaintiff was the only witness in her behalf. Her testimony is far from convincing and is not corroborated in any way by any of the other witnesses. The injuries which she alleges she received could have very well been suffered by her if she fell as the defendant's witnesses say she did. The testimony of the witnesses for the defendant, on the other hand, is clear and convincing and in no way do the defendant's witnesses contradict one another.

The plaintiff testified that she signalled a car of the defendant company to stop; that it did stop and that she stepped out from the sidewalk to board the car; that she handed a small grip she was carrying to a man who was standing on the back platform and that he reached down and took it; that she took hold of the brass rods fastened on the back end of the car at the front side of the rear platform and put her foot on the step; and that while she was in that position, in the act of boarding the car, the car suddenly jerked forward and threw her into the street. She says that as the car jerked forward her hand became wedged in between the brass rods and the car, greatly wrenching and injuring it. Her story about her hand being caught and held in this way is hard to comprehend, for, if she took hold of those brass rods while still standing in the street and the car had jerked forward as she raised her foot up to the step, it would be expected either that she would lose her hold on the rods and thus fall or she would hang on to the rods and be dragged more or less. How her hand could be drawn down between the rods and the car is hard to understand, and, if it were so wedged in between the rods and the car as to produce the bruises that were de-

cribed, it would seem inevitable that it would result in her being dragged along the street till the car stopped. There are a number of other features of her testimony that seem to us very unsatisfactory.

The witnesses for the defendant were the motorman of the car in question, the conductor, who was not in the employ of the defendant at the time of the trial, and two men who were passengers, one standing on the back platform and one sitting down at the rear end of the car. The motorman testified that he saw the woman wave her hand as he approached the crossing and came to a stop at the usual stopping place that she might board the car. He came to a full stop, he says, and stood in his usual position waiting for the signal of the conductor to proceed. After standing there, as he says, for two or three minutes, without getting the signal that he was expecting, he stepped to the side of the platform and looked out to the rear to see what was delaying their progress. Upon looking out he saw the conductor and one of the men passengers helping the plaintiff up off the ground. After they had helped her into the car and she was seated the conductor gave him the bell to go ahead, and he states that the car did not move from the time he brought it to a stop until after the conductor had rung his bell which was after the latter had assisted the plaintiff into the car.

The conductor testified that as the car came to a stop he looked out just as the plaintiff stepped off the curbstone; that she took one or two steps toward the rear of the car and then fell on the ground without touching the car or coming into contact with it in any way; that when she had

fallen her head was about three feet from the car and her feet three or four feet from the curb. The passenger who was on the rear platform testified that he was standing with his back to the rear, facing in the direction in which the car was going and ever on the right side of the platform near the step; that he first saw the plaintiff as she was coming across the cross street at the intersection where the car stopped, which was Armour avenue; that she stepped up onto the sidewalk, came across the corner diagonally, and then stepped off the sidewalk onto 31st street, which was the street on which the car was running; and that, after stepping off the sidewalk onto the street and walking two or three steps toward the rear end of the car, she fell in such a manner that he thought she had stepped on her dress; that she had not come into contact with the car in any way and had not touched the car at the time she fell; that the car had been standing still from the time he first saw her step from the street up onto the curb stone or sidewalk on the east side of Armour avenue; and that, as she lay in the street, after she had fallen, she was about four feet from the car and a step or two from the curb and that she was several feet west (ahead) of the platform where she would have boarded the car had she not fallen.

The other passenger testified that there were no cross seats in the car but two long seats facing in towards a center aisle and that he sat on the seat at the south side of the car at the rear end, right by the door leading out to the platform where the conductor and the other passenger were standing; that he saw the plaintiff

have headed the car and the car driver.

Several feet west (about) of the station where the car is
the car was a stop at the end of the car and that the car
stopped. After the car stopped, the car driver went from
west side of Avenue Avenue; and that, on the day in the
from the street at once the car started at 10:00 AM on the
had been standing still for the time in that the car was
and not touching the car at the time the car was
the car was not touching the car in any way and
cannot that the car was not touching the car; that
steps toward the car and at the car, the car is made a
off the station where the car was standing and at once
street on which the car was standing; and that, after standing

The other passengers testified that there were no seats in the car but two long seats facing forward. A carrier again told him the seat of the car was at the rear end, right by the door leading out to the platform where the conductor and the

on the sidewalk and that when she stepped off the sidewalk she fell down about three feet from the car and three or four feet from the sidewalk. As soon as she had fallen this witness got up and stepped out and assisted the conductor in helping the plaintiff up into the car. He described her position as she was lying in the street as being about in the middle of the car, half way between the back steps and the front steps and about three feet north of the car. The position of the body of the plaintiff as she lay in the street after falling, as described by the two passengers, is in no way contradicted and it is impossible to reconcile this testimony with the description of the accident as given by the plaintiff in her testimony. If she had been in the act of boarding the car at the rear platform and had been thrown from her feet to the ground by the sudden forward movement of the car, her body, as she lay upon the ground, would either have been opposite the back platform or somewhere to the rear of that point, but, instead of that, the only evidence in the record, as to the position of her body, is to the effect that it was some distance ahead of the platform.

There are other matters in connection with the testimony which seem to us to point in the same direction, but we will not enter into a discussion of them.

The damages alleged to have been suffered by the plaintiff, in her declaration, amounted to \$5,000.00.

The testimony was to the effect that such injuries as she had received necessitated her spending some four or five weeks in a hospital, much of the time in a plaster cast and that she suffered intense pain. If the plaintiff's

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There are other methods in connection with the treatment of the disease, but they are not mentioned in the text.

The charges alleged to have been collected by the Government in the Hawaiian Islands in 1947, 1948, and 1949 are as follows:

contentions were correct and she had suffered injuries to that extent as a result of such negligence of the defendant as would have been present if the occurrence happened as she has described it, she was entitled to substantial damages. It seems to us to be significant that both juries passing upon these facts have fixed her damages at a comparatively low figure, and, in view of all the testimony, we are unable to escape the conviction that the jury were moved to find the issues in her favor and give her a few hundred dollars because of their sympathy for her. She was a woman close to fifty years of age, was apparently practically alone in the world, and seems to have made her living in writing stories. It is clear that if the jury really had believed that she had suffered such injuries as were described and that the testimony of the defense was manufactured, a verdict for \$500.00 is hard to explain.

We are obliged to hold that the verdict is against the manifest weight of the evidence in this case, and we are therefore obliged to reverse the judgment for the plaintiff with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

FINDING OF FACTS:

The court finds that the defendant was not guilty of negligence as alleged by the plaintiff in her declaration or in any count thereof.

356 - 23322

EDWARD F. KEEBLER, doing business as E. F. KEEBLER & CO.,

210 I.A. 118

Appellant,) APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

vs.

A. J. FRANKS,

Appellee.)

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a suit brought in the Municipal Court of Chicago by Edward K. Keebler, appellant, hereinafter referred to as the plaintiff, against A. J. Franks, appellee, hereinafter referred to as the defendant, to recover commissions alleged to be due the plaintiff from the defendant for services rendered in negotiating a lease of certain premises, the property of the defendant. A jury was waived and there was a trial of the issues before the court resulting in a finding against the plaintiff and judgment was entered in favor of the defendant for costs, from which the plaintiff has appealed.

The defendant was the owner of certain premises in the City of Chicago occupied by one Henry Waterson, his tenant. The plaintiff had originally procured this tenant for the defendant. His lease had about a year to run when the defendant and the plaintiff had a conversation in which the plaintiff suggested it might take some time to procure a new tenant and that it would be well for something to be done looking to that end. It appears from the testimony of

811 A. 118

ALSO KNOWN AS THE "MILK" CASE

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both defendant and plaintiff that in this conversation the defendant authorized the plaintiff, acting in the capacity of a real estate broker, to get another tenant who would be willing to take a lease of the premises in question at a rental of \$8,000 per year, which was an advance of \$800 a year over the rental which the defendant was then receiving. As to the remainder of the conversation, the parties differ in their testimony. The plaintiff states that the defendant told him he did not want to lose Waterson as a tenant and he suggested to Keebler that he go out into the market and get another tenant and be sure of his ground before he took it up with Waterson. Keebler says, further, that Franks told him it did not make any difference to him who he rented to as long as he secured the increased rental. Franks, on the other hand, testified that in this conversation he told Keebler to go out and find a desirable tenant, and that, in case he did find such a tenant and one of whom he, Franks, would approve, that he himself would take the matter up with Waterson, the present tenant, but that under no circumstances was Keebler to approach Waterson. It is evident from the testimony that the idea of the defendant was that the tenant Waterson had proven desirable and if he would pay the increased rental he would prefer to retain him, but that before approaching him on the subject he wanted to have another acceptable tenant available in case Waterson declined to renew his lease. The defendant further testified that he told the plaintiff that if the latter succeeded in finding a desirable tenant, willing to take a lease on the premises at the new figure, he would expect to pay him a commission.

The undisputed testimony is that following this conversation the plaintiff negotiated with various parties

both defendant and plaintiff and in the conversation the
defendant testified that he was not in the company
of a man whose name he was unable to recall and was not
willing to take a chance of the witness in relation to a
visit of \$5.00 per hour which was an amount of \$100.00
paid over the period when the defendant was then testifying.
As to the testimony of the conversation, the witness testified
to their testimony. The witness stated that the defendant
told him he did not want to lose business as a result and he
suggested to Webster that he go out into the market and get
another barrel and be sure of his ground before he took it
up with Webster. Webster says, however, that he never told
him in this way and any difference to him who he wanted to
as long as he wanted the defendant to take. Then, on the
other hand, testifies that in this conversation he told
Webster to go out and take a barrel from the market and that
in case he did find such a barrel and one of whom he, Webster,
would approve, that he himself would take the matter up with
Webster, the present record, but that under no circumstances
was Webster to approach Webster. It is evident from the
testimony that the idea of the defendant was that the barrel
was from his own business and if he could get the in-
crease needed he would prefer to retain him, but that before
approaching him on the subject he wanted to have another
acceptable barrel available in case Webster decided to not
use his barrel. The defendant further testified that he told
the plaintiff that if the latter succeeded in finding a bar-
rel, he would, within 24 hours, be paid for the barrel at
the rate of \$5.00 per hour, the price being \$100.00 per barrel.

with reference to the premises and secured one Edward Hart of Cincinnati, who has a chain of stores throughout the country, to submit a proposition in writing to agree to lease the premises at \$8,000 per year. Whereupon the plaintiff notified Waterson that he had someone who was willing to lease the premises at the increased figure and asked him whether he cared to renew at that figure. Waterson replied that he was willing to execute the new lease at the advanced amount. Thereupon the plaintiff notified the defendant of the situation.

Assuming the facts to be as testified to by the defendant, it is our opinion that the plaintiff is entitled to his commission. The defendant bases his contention to the contrary upon two grounds. First, the plaintiff violated his instructions in approaching Waterson; and, second, he has not proven that the new tenant he secured was one who was acceptable to the defendant. In support of the first contention, the defendant alleges that where a broker is employed to transact a particular piece of business, and, in the transaction, is guilty of bad faith to his principal, he thereby forfeits his commission, citing Hafner v. Herron, 165 Ill. 242. Assuming that the defendant's contention as to the terms of his agreement with the plaintiff is correct, it cannot be said that the action of the plaintiff in approaching Waterson was such a course of conduct as amounted to bad faith, as would have been the case if there were any evidence to show that the plaintiff approached Waterson with a view to benefiting the latter rather than the defendant. It seems clear that the action of the plaintiff in this case in securing Waterson's renewal was for the purpose of

accomplishing the precise result which the defendant had stated he desired, namely, to get \$800 a year more for his premises and to retain his satisfactory tenant. It is true that if the terms of the agreement in question were as testified to by the defendant, the plaintiff violated his instructions and he did so at his peril, and, if, as a result of his so doing, Waterson had been lost to the defendant as a tenant and the defendant had been damaged thereby, the plaintiff would have forfeited his commission; but, as no damage has resulted to the defendant, no peril should attach to the plaintiff so far as his commission is concerned.

In connection with the defendant's second contention, he alleges that Hart was a myth. There is no testimony in the record to substantiate that charge. The plaintiff testified under oath that Hart was a man living in Cincinnati who had a chain of stores throughout the country and one who was financially responsible, and that he had a proposition in writing from him in which he agreed to lease the premises in question at the increased rental and there is no testimony in the record to the contrary. Again assuming that the terms of the agreement between the parties were as testified to by the defendant, we do not deem that it was essential to the plaintiff's case that he prove that Hart was acceptable to the defendant. The only object in securing the possible new tenant before approaching Waterson was to have someone engaged in a legitimate business who was able and willing to lease the premises at the increased figure in case the old tenant, whom the defendant preferred to retain, if possible, should

decline to renew his lease. The old tenant having renewed his lease at the increased rental, the question of whether Hart would have been acceptable to the defendant becomes immaterial. Here again, if the action of the plaintiff is to be considered a violation of his instructions, he took that course at his peril and if, as a result of the course he took, Waterson had declined to renew and the defendant had been confronted with the question of whether or not he wished to accept Hart and he had found sufficient reason not to accept him, the plaintiff might be said to have lost his commission, but, as long as no such contingency has arisen, we do not see that his commission should be imperiled. It does not follow from this that the plaintiff, without having done anything at all in the way of getting a new tenant, could have made use of an imaginary one for the purpose of inducing the old tenant to renew his lease, and, having succeeded in doing so, turn around and claim his commission. Before successfully laying claim to any commission, he would have to show that he had performed some service at the request of the defendant. The uncontroverted testimony in this record is to the effect that he did perform services and that they were at defendant's request, the services being the securing of an actual bona fide new tenant, engaged in a legitimate business, financially able and willing to lease the defendant's premises at the figure he had named. Having performed those services at defendant's request, and, as a result of the performance of those services, the defendant having accomplished his object, namely securing the renewal of tenant's lease at the increased figure, we hold that the plaintiff is entitled to his commission, notwithstanding the fact that, according to the agreement as tes-

tified to by the defendant, the plaintiff may be said to have gone beyond his instructions in that he approached Waterson himself, and, further, in that he took this step before making sure that Hart would be acceptable to the defendant if Waterson failed to renew. Although he thus went beyond his instructions at his peril, no loss has resulted and therefore his commissions should not be imperiled. The case presents no issue as to the amount plaintiff is entitled to.

For these reasons we are of the opinion that it was error to find the issues for the defendant but that the finding should have been for the plaintiff. The judgment of the trial court will therefore be reversed and judgment will be entered here for \$880, the amount of plaintiff's claim.

REVERSED AND JUDGMENT HERE.

371 - 23344

WILLIAM G. STEINER,

Appellee,

vs.

JOHN F. HIGGINS,

Appellant.

210 I.A. 119

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action brought by William G. Steiner, appellee, hereinafter referred to as the plaintiff, against John F. Higgins, appellant, hereinafter referred to as the defendant, for damages which the plaintiff claimed to have suffered as the result of an assault and battery committed upon him by the defendant. The jury found the defendant guilty and assessed the plaintiff's damages at \$200.00. The trial court entered a judgment for this amount from which defendant has appealed.

In urging a reversal of the judgment, defendant contends that the court erred in the giving of one of the instructions requested by the plaintiff and also that the judgment is against the manifest weight of the evidence. The instruction complained of was as follows:

"The court further instructs the jury that if they believe from all the evidence in this case that any witness has knowingly and wilfully testified falsely to any fact material to the issues in this case, then the jury may disregard all the testimony of any such witness excepting insofar as the testimony of any such witness may have been corroborated

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by other credible witness or witnesses whom you do believe, or by other facts and circumstances in evidence in this case."

The giving of this instruction was error. The evidence in this case was conflicting. It was important that any instruction on this subject should be accurate. The error was not harmless as the instruction was vital from the viewpoint of the defendant. This same instruction, with the exception of a few words which are not material, was involved in the case of Chicago & Alton Railroad Co. v. Kelly, 210 Ill. 449, where the Supreme Court reversed and remanded the cause solely because of the error committed by the trial court in the giving of the instruction. In that instruction the words used were "other credible evidence which they do believe" whereas the language in the instructions involved here was "other credible witness or witnesses whom you do believe."

For the error indicated the judgment cannot be allowed to stand.

REVERSED AND REMANDED.

an exact duplicate of the original
and no other, of the same kind and
material as the original.

The giving of this investigation was given, the witness in
this case was not satisfied. It was found that the witness
from the same source, which is a copy. The witness was not
satisfied as the investigation was given from the witness of
the same source. This was not satisfactory, and the investigation of
a few words which are not material, was given in the case
of which a copy was given to the witness. The witness was
not satisfied with the investigation and the witness was not
satisfied with the investigation of the witness in the
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The witness was not satisfied with the investigation which was

given as a copy.

THE WITNESS WAS NOT SATISFIED

210 I.A. 135

THE CITY OF CHICAGO,
Appellee,

vs.

SAM FERRERI,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. Defendant was convicted of keeping a disorderly house in violation of Section 2019 of the Chicago Code, and fined \$200 and costs.

Defendant waived a jury and submitted his cause for trial by the court. He now complains that he was arrested without a warrant being first issued or complaint made against him. These formalities were, however, observed subsequent to defendant's arrest and prior to his trial. No objection was made in the trial court to these irregularities, but with knowledge of them defendant voluntarily submitted himself to the jurisdiction of the court and proceeded to trial. At the time of the trial the court had jurisdiction of defendant and of the subject matter of the charge made against him, and his objection comes too late when made for the first time on appeal.

The merits of the conviction are not challenged.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

210 I.A. 135

THE CHICAGO TRIBUNE

CHICAGO, ILL.

THE CHICAGO TRIBUNE

CHICAGO, ILL.

THE CHICAGO TRIBUNE

THE CHICAGO TRIBUNE

CHICAGO, ILL.

This is an undated appeal, Petitioner was

convicted of keeping a disorderly house in violation of

Section 2015 of the Illinois Code, and fined \$100 and costs.

Petitioner denies a fact and admitted his name

for trial by the court. He now contends that he was arrested

without a warrant being first issued or complaint made against

him. These formalities were, however, observed subsequent to

defendant's arrest and prior to his trial. No objection was

made in the trial court to these investigations, but with

knowledge of them defendant voluntarily submitted himself to

the jurisdiction of the court and proceeded to trial. As

the time of the trial is not now and jurisdiction of defendant

and of the subject matter of the charge made against him, and

his objection comes too late when made for the first time on

appeal.

The writs of the conviction are not challenged.

The judgment of the municipal court is affirmed.

REVEREND.

210 I.A. 144

MARY T. HORSTMAN,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an action between passenger and carrier in which, on a trial before court and jury, there was a verdict and judgment for \$3300, and defendant seeks our review by appeal.

The negligence charged against defendant is that while the plaintiff was in the act of alighting from the car after the car had come to a dead stop and before she was able to complete her effort, the car was suddenly started, throwing her to the ground and resulting in her being seriously injured. The evidence was in sharp conflict. Six witnesses to the accident testified, four for defendant and two for the plaintiff. The strength of defendant's case on the evidence as to the manner in which the accident happened is much more strongly fortified by proof than is that of plaintiff's.

At the time of the accident plaintiff was accompanied by her niece, and both testified that the car stopped, that the stop was very brief and that plaintiff after the car stopped and before it started attempted to alight, in which process the car suddenly started, causing the accident. The contention of defendant is that the car did not stop on signal but made what is known as a "boulevard stop" and that plaintiff while the car was moving

APPENDIX

Page 1

APPENDIX A

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APPENDIX G

APPENDIX H

APPENDIX I

APPENDIX J

APPENDIX K

APPENDIX L

APPENDIX M

APPENDIX N

APPENDIX O

APPENDIX P

APPENDIX Q

APPENDIX R

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APPENDIX T

APPENDIX U

APPENDIX V

APPENDIX W

APPENDIX X

APPENDIX Y

APPENDIX Z

APPENDIX AA

APPENDIX AB

slowly stepped off the car with her back toward its front end, in spite of the conductor's warning to her not to get off; that the conductor attempted to save plaintiff from the consequences of her rashness by grabbing her, but failed to rescue her from disaster; that he immediately gave an emergency signal and that the car ran from ten to fifteen feet before stopping, and when it did so the front end of the car was at the regular stopping place on the east side of Hamlin avenue.

In the condition of this record the greater weight of the evidence favors, in our opinion, the theory of defendant. However, it is clear that the testimony is not harmonious, and this being so, well settled legal principles require accuracy in the rulings of the court upon evidence and instructions. We think the conversation concerning plaintiff's injuries between herself and a sympathetic woman after the accident and after plaintiff had been put back upon the car on which she was a passenger before she fell, was inadmissible, as was the order of the conductor to this woman to "move on." These conversations were no part of the res gestae, were inadmissible as evidence, and the court's allowance of such evidence against the objection of defendant was error. Such testimony was in no way connected with the manner of the happening of the accident or the injury sustained by plaintiff as a result thereof. As said in Chicago City Ry. Co. v. Uhter, 212 Ill. 174, -

"An act or declaration can only be considered as a part of the res gestae when it illustrates, explains or interprets other parts of the transactions, of which it is itself a part."

What took place between this woman, plaintiff and the conductor after the accident was entirely far-

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and the fact that the Commission has not yet received any information from the Commission on the progress of the investigation.

-100 CONT. -TERRY ANN SANDERS b6 to release and analyze

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Journal of Interpersonal Violence 26(10)

eign to the occurrence.

The court's ruling in permitting a medical man who had not treated plaintiff for her injury, but who had examined her for the purpose of qualifying as a witness to testify as to plaintiff's injuries and to testify as to subjective symptoms, was erroneous. The testimony of Dr. Johnson regarding his treatment of plaintiff was admissible, but it was error to allow him to give his opinion of subjective symptoms ascertained by an examination of plaintiff three years after he had ceased treating her for such injuries. It is apparent that the last examination was made, not for the purpose of administering treatment to plaintiff, but to qualify himself as an expert witness to her then condition. The admission of his testimony as to subjective symptoms which he found on such examination was erroneous. As said in Grainke v. C. C. Ry. Co., 234 Ill. 564, - "An expert witness called under such circumstances must base his opinion upon objective, and not subjective, conditions."

Instruction 2 given at the request of plaintiff has the inherent vice pointed out in Mazzella v. C. C. Ry. Co., case No. 22827, in which the writer of this opinion said:

"In this instruction certain elements are recited, among which is that the greater weight of the evidence is not alone determined by the greater number of witnesses testifying to any fact or set of facts. * * * The element of numbers, as well as of candor, fairness and intelligence, does not appear in this instruction.* * This court has had occasion to condemn a similar instruction in Zamiar v. The Peoples Gas Light & Coke Co., 204 Ill. App. 290, in which opinion it is said: 'In this case the number of witnesses testifying on one side was an important matter to be considered by the jury in determining where was the preponderance of evidence. It was reversible error

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to smother this important factor by the negative words used in the first part of the instruction, and by omitting it entirely from the affirmative statement of the element necessary to be considered. * * * In the condition of the proofs in this case the number of witnesses was an important element to be considered and there was no other instruction given which supplied the omission in this regard in instruction No. 7."

Instruction No. 2 lacks the essential elements pointed out in case supra, and there is no other instruction given which cures that error. It will be seen from what has already been said that the number of witnesses testifying for each party was an important matter to be considered by the jury in determining where was the preponderance of evidence, and there was no other instruction given which supplied the omission in this regard in instruction No. 2.

For the reasons stated the judgment of the Superior court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

-3/4 The above information was obtained from the records of the
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 1944-45 period. The above information was obtained from the
 100th Airborne Division, which was the only division of the
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452 - 23797

ELIZABETH RUSSELL,
Appellee,

vs.

CHICAGO CITY RAILWAY
COMPANY,
Appellant.

210 I.A. 145

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLBOM

DELIVERED THE OPINION OF THE COURT.

Plaintiff had a verdict and a judgment thereon for \$3,750, and defendant brings the record here for review by appeal.

The action is for personal injuries suffered by plaintiff through the colliding of two of defendant's cars, in one of which plaintiff was a passenger. The car in which plaintiff was riding bumped into a car ahead of it just as the car ahead was starting ^{south} from the north side of 65th street on Wentworth avenue.

We do not understand either that the liability of defendant for such damages as plaintiff actually suffered as a result of the impact above detailed, or that the accident and resulting injuries to the plaintiff were proximately attributable to defendant's negligence, are seriously disputed; but the damages awarded are said to be excessive as compensation for the injuries which plaintiff actually sustained.

The evidence is neither interesting nor particularly enlightening. It was a common accident with the usual resulting injuries, with a sharp conflict in the evidence as to the seriousness of such injuries. The weight of

311 A. 148

THE UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

RECEIVED
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U.S. DEPT. OF JUSTICE
WASHINGTON, D.C.

MEMORANDUM FOR THE RECORD

SUBJECT: [Illegible]

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the evidence and the credibility of the witnesses testifying for each disputant were the function of the jury to decide, and we are not able to say, after an inspection of the proofs in the record, that the jury were not warranted in finding that plaintiff sustained injuries which justified the finding and judgment found in the record. The evidence of the plaintiff and her witnesses on the question of her injuries and resulting damage, if given credence by the jury as against the evidence of defendant, is amply sufficient to sustain the verdict both as to injuries and damage. This is not a case on the facts which will justify this court in disregarding the conclusion at which the jury arrived, sanctioned as it was by the trial Judge in his refusal to grant the motion of defendant for a new trial. There are no errors of a reversible character in the rulings of the court upon the testimony of any of the witnesses, including the medical men who testified. The case was, we think, upon the proofs fairly presented to the jury within the rules of law sanctioned in this jurisdiction.

Twenty-three instructions were given to the jury, eight proffered by plaintiff and fifteen by defendant. Of these defendant claims there was an infirmity in but one. We think the jury were adequately and, in the main, correctly instructed upon the law of the case and sufficiently so. The instruction criticised is No. 5, for which plaintiff stood sponsor. It reads:

"If, under the evidence and instructions of the court, the jury agree upon a verdict finding defendant guilty, then in estimating plaintiff's damages, if any, it will be proper for the jury to consider the nature, extent and duration of plaintiff's bodily injuries, in so far, if at all, as has been shown by the evidence; and their effect, if any, upon the plaintiff's ability to pursue her ordinary calling, and to attend to her affairs generally, in so far, if at all, as has been shown by the evidence; and any reasonable sum which plaintiff has

necessarily paid, or has become obligated to pay, for surgical or medical services in endeavoring to be cured of such injuries, in so far, if at all, as has been shown by the evidence; and the bodily pain and suffering, if any, plaintiff sustained, or will sustain, as a direct result and in consequence of such injuries, in so far, if at all, as has been shown by the evidence; and any and all damages, in so far, if at all, as they are alleged in the declaration and shown by the evidence to be the necessary and direct result of the injuries complained of."

We cannot think that ordinarily intelligent men, which jurors are assumed to be, could understand that the "result of the injuries complained of" referred to other than those averred in the declaration. In fact, reading the instructions as a whole, which the law requires, not segregating one from the other, which the law does not permit, the jury must have understood that all injuries for which damages were recoverable were limited to those counted upon in the declaration, and none other. On the other hand, if there was an infirmity in this instruction, as defendant argues, it was remedied by other instructions given and unchallenged. Nothing in this instruction can be said to have misled the jury to the injury of defendant; nor, all the instructions considered, can it be said that any material right of defendant was affected to its prejudice. Again, an instruction given at the instance of defendant sets the whole dispute at rest, for it squarely told the jury what injuries plaintiff could recover for and that injuries predating the accident or infirmities suffered prior thereto must not be taken into consideration by the jury in its assessment of damages. This instruction reads:

"If the jury believe from the evidence that prior to the injury complained of in this case the plaintiff was afflicted with ailments or disabilities and that said ailments or disabilities are still in existence, the plaintiff cannot hold the defendant responsible in this action for such ailments or disabilities. The defendant's liability, if it be liable at all, would be measured by the damage or injuries which were the natural and proximate result of its negligence, even if the jury believe from the evidence that the defend-

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ant was negligent. If the jury believe from the evidence that plaintiff's present condition is the result of physical disorders, or physical infirmities, that existed prior to the accident in question, she cannot recover damages for such condition, and she cannot recover damages for any condition existing prior to the accident."

The reasoning regarding the alleged misleading character of instruction No. 5 is, if it had any force at all, dissipated in the light of the instruction last quoted.

The record discloses a fair trial and a just result under well settled principles of law invokable in cases of like import, and although thirty-one distinct reasons for granting a new trial appear in the written motion for a new trial, and thirty-four assignments of error are endorsed upon the record by defendant, they each and every one of them lack merit. There were erroneous rulings on evidence favoring defendant, but they failed to affect the ultimate result.

The judgment of the Superior Court does justice between the contestants under the law and is affirmed.

AFFIRMED.

The first part of the report, which is the most important, is the one which deals with the question of the future of the country. It is a very interesting and important part of the report, and it is one which should be read by every one who is interested in the future of the country.

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The seventeenth part of the report is the one which deals with the question of the future of the country.

POWER EQUIPMENT COMPANY,
a corporation,

Appellant,

vs.

GALE INSTALLATION COMPANY,
a corporation,

Appellee.

210 L.A. 117

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capiat
and for costs.

The cause was tried before the court by the agreement of the parties. The pleading of plaintiff is the common counts and that of defendant is the general issue with an affidavit of merits. There was issue joined on a plea of set off; this issue, however, was not pressed and is therefore eliminated from the cause so far as this appeal is concerned. The finding and judgment rest solely on plaintiff's proofs.

Defendant's first affidavit of merits was defective and as the pleadings at that stage of the case stood, plaintiff would have been entitled to a judgment on its affidavit of claim. About four months before the trial defendant moved for leave, which was granted, to file an amended plea and affidavit of merits; to this plaintiff objected and excepted. The ruling of the court on this motion was correct. It was but the exercise of a sound judicial discretion in the promotion of justice. No right or interest of plaintiff was prejudiced thereby.

Attached to the common counts is a copy of the account sued on, which sets out an indebtedness from defendant of \$465 as an extra charge for substitution of "new

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boilers* in place of secondhand ones, as per letter of May 19, 1914, and other extras according to a letter of May 7, 1914, supplementing a contract dated April 10th preceding this letter.

The contracts and letters above referred to were before the trial Judge and are found in the record before us. While the court rejected them as evidence, such rejection was based upon an examination of them and a determination as to their legal purport and effect as applied to the rights of the parties under the issues made by the pleadings. These documents proved that payments called for by the account sued upon were to be made not by defendant but by the notes of the Lomax Town Company, for which defendant was acting in the transaction. In the letter of defendant to plaintiff dated May 19, 1914, and which plaintiff tendered as evidence, defendant wrote:

"Referring to our contract with you under date of April 10th and your acceptance of May 7, and referring more particularly to the second hand, 72 inch by 18 feet Horizontal Tubular Boilers * * for an additional price to you of \$465, would say, we enclose herewith copy of your specifications and our letter to the Lomax Town Company, Wm. T. Love, Trustee, and their acceptance of the same, and your offer to furnish the new boilers is hereby accepted on condition that you accept as your full and complete payment this additional sum of \$465 in four equal notes of the Lomax Town Company, Wm. T. Love, Trustee, as described in their acceptance."

The offer referred to of April 10th, accepted on May 7th, contained this condition:

"We understand and agree that we are to look to the Lomax Town Company for the payment of said Fifty-five hundred dollars (\$5500) as evidenced by the notes aforesaid, and we are to have no claim of any kind against the Gale Installation Company or any one connected with said Company for all or any part of said fifty-five hundred dollars."

This would seem upon the merits to absolve defendant from any financial liability to plaintiff unless it might be said that it would be liable to respond in such

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damages as plaintiff might suffer if it failed to procure the Lomax Town Company notes as agreed. Furthermore, these accounts were not admissible under the common counts, because under them defendant was not liable to pay the specific account attached to the common counts and which constituted the claim of plaintiff against defendant. There was no agreement to pay money, but the debt was to be liquidated by the notes of the Lomax Town Company and therefore the agreement does not come within the doctrine announced in Chicago v. Duffy, 218 Ill. 242, and many other cases which hold that where nothing remains to be done under a writing but the payment of the sum in such writing agreed to be paid, the writing is competent as evidence under the common counts. An entirely different rule prevails here than the one contended for by plaintiff, which is as laid down in Hollister v. Lyon, 177 Ill. App. 652, to the effect that indebitatus assumpsit is not the proper form of action where the agreement sought to be enforced is not for the payment of money but for the doing of something else. Smith v. Dunlap, 12 Ill. 183, proceeds upon the same doctrine. In Meyers v. Schamp, 67 *ibid* 469, it is held that the common counts are insufficient to support a contract where property is purchased to be paid for in anything but money. In such cases the action must be special.

We find no errors justifying a reversal of the judgment of the County Court and it is therefore affirmed.

AFFIRMED.

477 - 23822

210 I.A. 148

VACLAV VANEK, Appellant,

vs.

CHICAGO CITY RAILWAY
COMPANY,

Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries there was a verdict in favor of defendant and judgment of nil capiat and for costs, from which plaintiff appeals.

Plaintiff was a passenger in an automobile which collided with a street car of defendant and was injured. Another person drove the automobile,

We have examined all of the proofs of the parties found in the record, and think that therefrom the jury might reasonably find that plaintiff was not in the exercise of due care for his own safety at the time of the collision in which he suffered injury.

The cause was tried upon the theory that the negligence of the driver of the car was not attributable to plaintiff, and such is the law; but it is also the law that a passenger cannot sit inactive when danger is imminent and be regarded as having exercised due care for his own safety - upon which theory the action proceeded and such is the averment in the declaration. The proof fails to show that plaintiff exercised any care or did anything when the danger was imminent and obvious to him to prevent the accident. Plaintiff's own testimony discloses that at and before the happening of the accident he was engaged

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in conversation with a fellow passenger, that he saw that the accident was imminent, that he feared the driver would be killed and that he would lose his eyesight; yet the testimony is silent as to his having done or said anything to the driver by way of cautioning him or otherwise in an attempt to prevent the collision. Plaintiff and his fellow passenger were Presbyterian ministers and their talk was regarding church work.

From plaintiff's own evidence, as before said, we think the jury might well have found that he was not in the exercise of due care for his own safety and had not sustained by proof that averment of his declaration.

On the facts this case is similar to Carden v. Chicago Railways Co., No. 23927, in which case an opinion is filed herewith; and Fredericks v. Chicago Railways Co., case No. 23096, not yet reported.

The evidence also demonstrates that defendant was not guilty of the negligence charged, but that the collision resulted from the reckless conduct of the driver of the automobile in attempting to cross the street car tracks in front of the approaching street car, which the motorist, by the suddenness of the driver's action, was unable to stop in time to prevent the collision.

Plaintiff complains of the court's refusal to give an instruction asked by him and to the giving of the instruction requested by defendant, which instruction, number 20, is in substantially the same form as one which received the approval of this court and the Supreme Court in Gnatek v. Chicago Ry. Co., 182 Ill. App. 392; H. D. T. Co. v. Browdy, 206 Ill. 614; Scanlan v. C. D. T. Co., 127 Ill. App. 406; Rack v. C. C. Ry. Co., 173 Ill. 209. The giving

IN CONSIDERATION OF THE FACTS SET FORTH IN THE
FOREGOING PARAGRAPHS, AND THE FACTS THAT THE
PLAINTIFF HAS BEEN IN POSSESSION OF THE
PROPERTY IN QUESTION FOR A PERIOD OF SEVERAL
YEARS, AND THAT THE DEFENDANT HAS BEEN IN
POSSESSION OF THE SAME FOR A PERIOD OF SEVERAL
YEARS, THE COURT IS OF THE OPINION THAT THE
PLAINTIFF IS ENTITLED TO THE PROPERTY IN
QUESTION.

IT IS THE ORDER OF THE COURT THAT THE
DEFENDANT SHALL RESTORE TO THE PLAINTIFF
THE PROPERTY IN QUESTION, AND THAT THE
DEFENDANT SHALL PAY TO THE PLAINTIFF
THE COSTS OF THIS SUIT.

IT IS SO ORDERED.

THE PLAINTIFF'S PETITION FOR
RECOVERY OF THE PROPERTY IN QUESTION
IS GRANTED, AND THE DEFENDANT IS
ORDERED TO RESTORE THE PROPERTY TO THE
PLAINTIFF, AND TO PAY THE COSTS OF
THIS SUIT.

IT IS SO ORDERED.

of this instruction was without error.

Plaintiff requested the court to give the following instruction, which it refused to do:

"The court instructs the jury that even though you believe from the evidence that the driver of the automobile in which plaintiff was riding was guilty of negligence, that fact alone would not relieve the defendants from liability, if you believe from a preponderance of the evidence that the defendants were guilty of negligence, as charged in the declaration, and that the plaintiff was free from negligence."

This instruction was proper and applicable to the case, but it was a repetition of other instructions which the court gave at the request of plaintiff; they are numbered 2 and 8. Number 2 reads:

"If the jury find from a preponderance of the evidence in this case that the plaintiff was at and just prior to the time and place in question, riding in an automobile, in the use of ordinary care for his own safety, and that the defendant, by its motorman, then and there negligently drove one of its cars against the said automobile and thereby plaintiff was injured as alleged in his declaration, then you should find the defendant, Chicago City Railway Company, guilty, and assess the plaintiff's damages at whatever sum you find from the evidence he has sustained, if any, by reason of these injuries, if any."

Number 8 reads:

"If you believe from the evidence, under the instructions of the court in this case, that the driver of the automobile and the motorman of the defendant were both guilty of negligence proximately causing the collision and injury, if any, as charged in the declaration, then you are instructed that you have no right to compare the negligence of the driver of the automobile with that of the motorman of the defendant and find a verdict according to which side you think was guilty of the greater negligence, for in such cases it is the law that it makes no difference which was guilty of the greater negligence; but, under such circumstances, you will find for the plaintiff, providing you further find that the plaintiff himself was using ordinary care for his own safety at the time and place in question."

These instructions amply cover the law regarding the negligence of the driver of the car not being attributable to the plaintiff, and also told the jury that if they believed from the evidence that defendant was guilty of negligence which brought about the collision which resulted in the injury to

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plaintiff, and that plaintiff was using ordinary care at the time for his own safety, they should find the defendant guilty and assess plaintiff's damages, etc.

Counsel cannot with good grace complain that these instructions brought prominently before the jury the question of the negligence of the driver of the automobile, as that fact is embodied in the very instruction which counsel now claim the court ought to have given. These are the words used. "The court instructs the jury that even though you believe from the evidence that the driver of the automobile in which plaintiff was riding was guilty of negligence, that fact alone would not relieve the defendant from liability. * * * The court's refusal to give the instruction was proper, because the law therein stated was covered by the two instructions, 2 and 8, above set out.

We are in accord with the finding of the jury on the facts, and there being no errors in procedure justifying a reversal of the judgment of the Circuit Court, it is affirmed.

AFFIRMED.

210 I.A. 150

LOUIS LEGURIATES,
Appellee,

vs.

E. F. McDONALD & COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$585 entered on the verdict of a jury in a tort action of the Fourth Class. After judgment defendant moved to vacate it. No error is, however, assigned on the court's denial of this motion. The error assigned concerns the refusal of the court to allow defendant to file an affidavit in support of that motion.

October 24, 1917, this court on motion struck from the record the Statement of Facts. Nothing but the statutory record remains for review. No error assigned and argued can be considered without referring to the Statement of Facts, and as this has been stricken nothing reviewable remains in the record; therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

CABLE LUMBER COMPANY,
a corp.,

Appellee,

vs.

THOMAS EACK,

Appellant.

210 I.A. 151

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE HOLCOM
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$92 entered upon the verdict of a jury.

The suit is for a bill of lumber and the dispute seems to hover around the question as to whether the defendant or the Phoenix Electric Company is liable. The account in question was billed to defendant.

We think that from the testimony the jury might reasonably and fairly have found that the lumber was delivered to defendant and that he was liable to pay therefor. The salesman who sold the lumber testified that he sold it to defendant and presented to him a bill for the same and that defendant promised to pay it. Defendant also promised to pay the account to Maurice R. Cable, president of plaintiff, and to one Solomon, a lawyer. The amount of the judgment is the balance due for five items of lumber totalling \$176.14. Deliveries to defendant were sufficiently proven and his promises to pay to three persons the balance due are convincing to the ordinary mind that he received the lumber.

The whole difficulty encountered is of defendant's creation. His office and that of the Phoenix Electric Company were in the same place. He was the president of the company and the owner of most of its stock, and had dealings with

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There is no doubt that the above information is correct and that the same is being furnished to the proper authorities for their consideration.

plaintiff before the organization of the company.

There are many circumstances disclosed by the evidence which discredit defendant. In the first place, the abstract is not fair and plaintiff was put to the necessity of furnishing an additional abstract. This additional abstract discloses billings made to defendant and changed to Phoenix Electric Company, and that defendant said to the witness Cable, "If you start suit I will enjoy that, and it will take three years before we will try the case and you will never get anything." The record also shows that defendant's counsel withdrew from the case before the conclusion of the trial and took the stand and testified for defendant, and that defendant from that time on conducted his own case, although the original counsel is on the brief in this court. That the charter of the Phoenix Electric Company is not recorded in Cook County is shown by the additional abstract and not by the one filed by defendant.

Many errors are assigned and argued at length, but none of them affects the merits of the case. While there may be errors of procedure, none of them is vital or affects the merits of plaintiff's claim. We will not discuss them but rest content in saying that there are no errors in the record prejudicing in the slightest degree defendant's rights or calling for a reversal of the judgment and the awarding of a trial de novo.

The doctrine announced in Coer v. Chapin, 163 Ill. App. 654, is equally applicable and controlling of our decision in this case. There the court said:

"Complaint is made of the rulings of the trial court upon the admission and rejection of evidence, and also upon the instructions given and refused. While there are some inaccuracies in the instructions and some slight errors upon the question of the introduction of evidence and the record is not free from error, there is no error prejudicial to appellant and where substantial

THEORY OF THE EARTH AND ITS HISTORY

The theory of the earth and its history is a branch of geology which deals with the origin and development of the earth and its various parts. It is a science which seeks to explain the processes which have shaped the earth and its features, and to determine the sequence of events which have taken place since the earth was first formed. The theory of the earth and its history is based on the study of the earth's rocks and fossils, and on the principles of geology. It is a science which is constantly developing, as new discoveries are made and new theories are proposed. The theory of the earth and its history is a branch of geology which deals with the origin and development of the earth and its various parts. It is a science which seeks to explain the processes which have shaped the earth and its features, and to determine the sequence of events which have taken place since the earth was first formed. The theory of the earth and its history is based on the study of the earth's rocks and fossils, and on the principles of geology. It is a science which is constantly developing, as new discoveries are made and new theories are proposed.

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justice has been done by a judgment, the judgment should not be reversed upon slight errors which are not shown to have been prejudicial to the party complaining."

These observations are pertinent to the instant case.

The judgment of the Municipal Court is affirmed, and the cost of the additional abstract will be taxed as costs in the cause.

AFFIRMED.

During the past few years, the Government has been making a great effort to improve the condition of the country, and it is now in a position to do so.

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547 - 23892

MAGDALENA JUNK,
Appellee,

vs.

NON-CORROSIVE ROLLABLE
METALS COMPANY, a cor-
poration,
Appellant.

210 I.A. 152
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

On April 7, 1917, a judgment by confession was entered in the Superior Court in favor of plaintiff and against defendant for \$2114.66. On April 13th thereafter defendant made a motion to open up the judgment and for leave to plead and in support of this motion two affidavits were filed. On the 21st of the same month the motion was denied, from which order defendant prayed and was allowed an appeal to this court and the amount of the bond was fixed. On the 26th of the same month defendant renewed its motion theretofore made and filed one affidavit in support of said motion. May 26th thereafter the court disposed of the motion by denying the same, and defendant excepted and prayed a further appeal to this court, which was allowed in bond of \$2500. June 8, 1917, an appeal bond in the last mentioned appeal was filed and approved and this appeal bond we find in the record. This presents for our review the proceedings on the second motion. No motion has been filed to vacate the order denying the first motion of defendant to open up the judgment and to be let in to defend.

Notwithstanding the fact that the proceedings culminating in the initial order denying the motion to open up the judgment is not before us, we have carefully examined

all of the affidavits proffered on both motions and heard by the trial Judge. Waiving all technicalities of procedure, we are quite in accord with the learned trial Judge when he made the following observation: "Give her" (meaning plaintiff) "the stock and keep the money. If the stock is worth money no harm is done and if it isn't worth the money then this woman is being cheated."

The whole contention is that there was an accord and satisfaction by the tender of stock to plaintiff, which stock it is claimed she had agreed to take in satisfaction of the note. It affirmatively appears, however, that the transaction was not closed, that there was no accord and satisfaction, and that there still remained unpaid on the note, according to defendant's own showing, the interest thereon. It is clear that the minds of the parties never met upon this stock transaction and that Mrs. Junk never agreed to take the stock tendered in settlement of the note upon which judgment was confessed. The leaving of the stock with Mrs. Junk was an attempt to overreach her in the transaction and a subterfuge resorted to for the purpose of avoiding the payment of defendant's note in suit by forcing upon her stock of doubtful value in settlement. It appears from the letter of plaintiff's son, admitted into the record on the offer of defendant, that, far from there being an accord and satisfaction between the parties, there are other outstanding obligations from defendant to plaintiff.

A motion to open a judgment to be let in to plead, answer or demur cannot be entertained. A defense to be entertained on a motion to open a judgment to let in a defense must be a defense upon the merits. The motion was to be let in to plead, not upon the merits, but to "plead, answer or demur to the declaration." The motion in this

form was sufficient reason for its denial. Packer v. Roberts, 140 Ill. 9; Farwell v. Huston, 151 *ibid* 239.

In the condition of the record before us the judgment cannot be disputed, nor is it attacked in this record. The attack is confined to the court's denial of the renewed motion to open the judgment. When this motion was before the trial Judge the whole matter was res adjudicata and that fact was sufficient reason for the court's denial of the second motion. the appeal from which order is the appeal before us. It was held in Kaufman v. Schneider, 35 Ill. App. 256, that a ruling upon a motion which is final is appealable and the same may be interposed as an estoppel, no appeal having been taken, when the matters decided are again sought to be made the subject of controversy. The instant case is in the same actual condition as case supra, because, while an appeal was prayed it was not perfected and the case was therefore, for all practical purposes, to be treated as though no appeal had been prayed. An appeal prayed and not perfected is not an appeal.

There is no merit in this appeal and the judgment of the Superior Court is affirmed.

AFFIRMED.

There are several reasons for this.

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210 I.A. 155

GRACE GARDEN,)
Appellee,)

vs.)

CHICAGO RAILWAYS COMPANY,)
Appellant.)

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for \$2500 upon the verdict of a jury in an action for damages resulting from a collision between an electric automobile in which plaintiff was riding and an electrically propelled car of defendant. The collision is charged to have resulted from the negligence of defendant while the plaintiff was in the exercise of due care for her own safety.

Many errors are assigned upon the record, and while there are several which call for a reversal of the judgment, yet in the conclusion to which we have come we shall place our decision upon the proposition that the verdict and judgment are contrary to the manifest weight of the evidence.

The accident happened on the 9th day of August, 1913, at about ten o'clock at night. Plaintiff and her sister were returning from an evening ride in an electric car owned by their mother to the garage in which the car was kept at 3329 West Madison street, Chicago. The car was driven by plaintiff's sister Agnes. The garage to which the car was being driven was on the south side of West Madison street between two intersecting streets. On West Madison street defendant operated on two tracks what is colloquially known as trolley cars; on the north track westbound cars were operated and on

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the south tracks cars going to the east. Plaintiff contended and proved that her sister Agnes was driving the car east on the south side of Madison street; that on approaching the vicinity of the garage, the objective to which the car was being driven, the car waited to let an east bound car pass; that plaintiff saw an east bound car on the north track, which seemed to her to be quite a distance away, so far as Kedzie avenue; that her sister started to turn the car; that plaintiff paid no further attention to what was going on and the next thing she knew there was a crash and she was dragged out of the car by a policeman and taken to the hospital. At the time of the collision the electric car was on the west bound track and the force of the collision pushed it from the west bound track over past the east bound track.

It is clear that both plaintiff and her sister Agnes were negligent to the point of recklessness in attempting to drive the car across the street after the east bound car had passed, knowing that they were in the middle of the block and that a car was coming to the west on the north track.

A witness for plaintiff, a dentist, testified that he was a passenger on the west bound car and that he noticed the electric car of plaintiff turning across the tracks when the street car was on the east side of Spaulding avenue about 150 feet from the point of the accident. He also testified that the car was proceeding at the rate of about 20 miles an hour. The physical situation demonstrates beyond peradventure that this witness is in error, because if the car was going at the rate of 20 miles an hour, the electric car would have been demolished and its occupants very seriously injured or killed when the impact occurred. This witness'

testimony as to how the electric car was struck and pushed by the street car refutes his judgment as to the rate of speed and the distance of the car from the point of the accident of the car in which he was riding. This dentist witness gave as a method for determining speed, the working of an electric dental engine that he used in his business - a very unsatisfactory and uncertain method when applied to the speed of a street car. Even plaintiff's counsel apparently doubts the soundness of the judgment of this witness on this point. Counsel lays down a rule which is new to us when he says, "Courts take cognizance of the fact that witnesses can give but a blanket impression of what they saw," and also argues that an analysis of the situation would indicate that the doctor "was probably not far wrong." We think the doctor was very far wrong and that his testimony, when considered with reference to the physical situation of the street car and the electric car, is self-refuting. There is reliable evidence in the record from which the jury might find that when the electric car was on the west bound track the west bound car was within 35 feet of it, and the whole environment and what transpired when the collision took place strongly accentuates the correctness of such conclusion. It is evident from these facts that the motorman's vision of the electric car was obstructed by the passing of the east bound car and that when he did see the electric car he did all that was humanly possible to stop the car, and his efforts in this regard evidently did minimize the force of the impact.

The evidence of Agnes Carden convicts her of negligence when she said, "I was looking right north, the way I was driving across the street. I never saw the car

was struck." Furthermore, this witness testified that she could stop her car within five or six feet when the car was going at the rate of four or five miles an hour, and that the car was moving slowly. Therefore, if she looked to the east she could have seen the near approach of the west bound car and could have stopped her car in time to avoid the collision; and if the street car was as far south as Spaulding avenue then there was ample time, in the exercise of due care, for her to have cleared the track and avoid the collision. This she failed to do. With an imminent danger so apparent, as it would have been had she looked as she ought in the direction of the car which she knew was coming toward her, it was negligence to stop upon the track or to go slowly. It is likewise negligence per se for a person to attempt to cross in front of an approaching street car without looking.

The evidence shows that there was a man in the car with plaintiff and her sister, and neither of them made any exclamation or gave any words of caution to prevent the attempt to cross the street car tracks in front of the approaching west bound car. From the electric car the street was visible to all of the occupants if they had looked. Plaintiff testified: "I didn't pay any attention whatever to our turning. I knew the automobile was being turned there across the tracks in Madison street in the middle of the block. I paid no attention whatever. I didn't know; I didn't see or hear this car at all until it struck the automobile." This testimony convicts plaintiff of an entire lack of ordinary care for her own safety at and before the time of the collision, for which negligent conduct the law inhibits a recovery. While the negligence

of Agnes Carden cannot be imputed to plaintiff, still plaintiff is responsible for her own negligence, and in not making such efforts as were within her power to avoid the collision she was guilty of negligence which inhibits a recovery.

What was said by the writer of this opinion in the case of Fredericks v. Defendant, in case Gen. No. 25096, not yet reported, is equally applicable here:

"Because plaintiff was a guest of the car owner and was not driving the car does not exonerate him from the duty of care so far as, under the circumstances in which he was at the time situate, he was capable of exercising. The law will not exclude a total absence of care because plaintiff was not driving the car. On the contrary, the law imposed upon him the duty to use such care as he was able. He could not, as the evidence foreshadows, sit back silent and motionless in a position of danger open to his observation. He was not, in the circumstances of this case, absolved from any care or relieved from the general legal principle that he must be in the exercise of due care for his own safety at the time of and immediately preceding the accident in order to entitle him to recover."

For the want of ordinary care on the part of plaintiff, the exercise of which would have avoided the accident, the judgment of the Circuit Court is reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

The court finds as ultimate facts that plaintiff was not in the exercise of ordinary care for her own safety at the time of the accident in which she received injuries damages for which are sought in this suit; that such lack of ordinary care was the proximate cause of the accident and the resulting injuries to her; and also that the defendant was not guilty of any negligence charged against it in plaintiff's declaration.

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

THE PEOPLE ex rel. STANISLAW
NOWAK,

Appellee,

vs.

THE POLISH NATIONAL ALLIANCE
OF THE UNITED STATES OF NORTH
AMERICA,

Appellant.

210 I.A. 156

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLCOM

DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order awarding a peremptory writ of mandamus restoring the appellee petitioner as a member of the respondent appellant, from which he was expelled March 25, 1915.

In the view we take of this case it is unnecessary to particularize as to the charges made, which resulted in the expulsion of the petitioner. It is not our function, nor was it the function of the trial court, to review the record of the proceedings and trials which culminated in petitioner's expulsion from the defendant order. It is, however, material to decide whether the respondent had jurisdiction of petitioner and the right to expel him if the charges preferred against him were found to be true.

There were five accusations against petitioner, of four of which he was adjudged to be guilty. These charges were in writing and are in substance:

1st. That petitioner, being a member and a director of respondent alliance, took 2 1/2 per cent as a commission from Michael Przybylo, a member of Group 1041, for procuring for him a loan from the alliance in preference to other applications pending prior to Przybylo's; that for such commission in the nature of a bribe petitioner agreed to procure the loan with-

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THE SECRETARY OF THE
TREASURY
WASHINGTON, D. C.
20548

UNITED STATES DEPARTMENT OF THE TREASURY
WASHINGTON, D. C.

TO THE SECRETARY OF THE TREASURY
FROM THE SECRETARY OF THE TREASURY
SUBJECT: [illegible]

[illegible text block]

[illegible text block]

[illegible text block]

in a week; that petitioner represented that the commission was to be divided among the members of the central government of the alliance.

2nd. That petitioner extorted from another member named Jacob Kulik \$100 under threat that he would spoil the loan if the \$100 was not paid him.

3rd. That petitioner purchased a building numbered ¹⁸⁴⁵ Wilmet avenue for \$7,000 and desiring to get a loan of \$5,000 from the alliance on its security he procured a Mr. Lach to take the title temporarily and make application for the loan, which he did, and was paid \$25 for so doing; that petitioner procured himself to be placed upon the valuation committee and got the loan within twenty-four hours and then had the title to the property conveyed by Lach to himself.

4th. That petitioner betrayed confidential matters of the central government of the alliance in order to hinder the carrying through of many projects for the good of the respondent organization; that he gave the annual minute book to a Mr. Dobski, contrary to the rules of the order, and that he gave it out that there was a spy who was a member of the central government, who made false statements regarding the same, etc.

5th. That he caused slanderous articles to be published in two Polish newspapers on February 17, 1915, in which he pictured members of the central government as persons working only for their own private gains; whereas petitioner was the only one in the whole central government who not only drew gains from the alliance, but always did so in a dishonest way; that petitioner in these articles stated that he resigned solely on account of growing tired of working for the good of the organization, when, in reality, he resigned because he grew tired of plotting to

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make money easily and to get control of the alliance.

A copy of these charges was served on petitioner and a trial board appointed in accord with the rules and regulations of the alliance.

Under the rules of the alliance, a member might be expelled therefrom for some of the four offenses charged and of which petitioner was found guilty.

At the time the charges were made against petitioner he was a director and a vice-president of the alliance. The petitioner answered these charges, was given a hearing, appeared in person and put in his defense, and being adjudged guilty was expelled from membership.

From this decision petitioner appealed to the supervisory council, as he had under the rules of the alliance the right to do, and the action of the trial board and its sentence was affirmed by that body. A further appeal to the Schenectady convention from the supervisory council was taken by the petitioner, and September 28, 1915, the action of the supervisory council was confirmed by that convention. Here the case we think rests as finally determined in accord with the rules, regulations and practices of the alliance.

It affirmatively appears that petitioner had notice of the charges preferred against him; that he was served with a copy of them; that he also had notice of the time set for the hearing and his trial under the charges made; that he appeared in person and contested the verity of these charges; that he prosecuted two appeals from the order of expulsion and was defeated in both of them. The charges made were of the nature and character which the rules and regulations of the alliance permitted. We therefore deduce from these facts that there was jurisdiction of

1. The first part of the report is a general introduction to the subject.

2. The second part is a detailed description of the methods used in the study.

3. The third part is a discussion of the results of the study.

4. The fourth part is a conclusion and a summary of the findings.

5. The fifth part is a list of references.

6. The sixth part is an appendix containing additional data and figures.

7. The seventh part is a glossary of terms used in the report.

8. The eighth part is a list of abbreviations.

9. The ninth part is a list of symbols.

10. The tenth part is a list of tables.

11. The eleventh part is a list of figures.

12. The twelfth part is a list of footnotes.

13. The thirteenth part is a list of appendices.

14. The fourteenth part is a list of references.

15. The fifteenth part is a list of symbols.

16. The sixteenth part is a list of abbreviations.

17. The seventeenth part is a list of tables.

18. The eighteenth part is a list of figures.

19. The nineteenth part is a list of footnotes.

20. The twentieth part is a list of appendices.

21. The twenty-first part is a list of references.

22. The twenty-second part is a list of symbols.

23. The twenty-third part is a list of abbreviations.

24. The twenty-fourth part is a list of tables.

25. The twenty-fifth part is a list of figures.

26. The twenty-sixth part is a list of footnotes.

27. The twenty-seventh part is a list of appendices.

28. The twenty-eighth part is a list of references.

29. The twenty-ninth part is a list of symbols.

30. The thirtieth part is a list of abbreviations.

31. The thirty-first part is a list of tables.

32. The thirty-second part is a list of figures.

33. The thirty-third part is a list of footnotes.

34. The thirty-fourth part is a list of appendices.

the subject matter of the charges and of the person of petitioner. This was ample to justify the finding against and expulsion of petitioner as a member of the alliance. While the trial board was legally appointed, petitioner objected to one of the members thereof as incompetent to serve. That was a matter for the alliance to determine and not the courts. With that judgment we have no authority under the law to interfere. It is also insisted by petitioner that he had theretofore been acquitted upon trial of three of the charges made against him and that as to them the case was res adjudicata. Be that as it may, there are two answers to this insistence. In the first place, there being five distinct charges made against petitioner, two of them would still remain for hearing and disposition if the res adjudicata contention of petitioner was heeded, and furthermore, in the condition of the law hereafter cited, we have no right to review the action of the trial board where it had jurisdiction of the subject matter and of petitioner, which we hold it had.

No intendants are to be indulged regarding the right of a party to a writ of mandamus. One who seeks this extraordinary remedy must by averment and proof show unqualifiedly a right to the writ. Mere informality in the proceedings attacked is insufficient to warrant an award of the writ. Expulsion of a member of a corporation will not justify interference by mandamus where it appears from the record that there were just grounds for such action and that the petitioner had been acting in hostility to the corporation and that he seeks a restoration in order to continue such conduct of hostility. High on Extraordinary Legal Remedies, 3rd ed., Sec. 301. We think the record sufficiently shadows forth that petitioner not only did act

[illegible]

in hostility to the alliance, but was guilty of actions hostile to its well being, good name and prosperity, and that he is so malign in his conduct toward the alliance that if restored to membership he would continue the conduct which the alliance regards as hostile to its well being, as the trial board found, and which finding was confirmed on two appeals.

Under well settled legal principles the alliance had a right to discipline petitioner, one of its members, as it did, notwithstanding he had a financial interest as an insured member, of the benefit of which expulsion from the order would deprive him. Loore v. National Council Knights and Ladies of Security, 65 Cal. 452, in which the court said:

"It is further urged that the property rights of the plaintiff in error may not be taken from him except by due process of law. The correctness of this proposition is freely granted. The right to be free from discipline is not, however, a property right; and discipline may proceed to the point of suspension or expulsion from the order, even though such disciplinary measures result in the forfeiture of the rights of the expelled member. Beyond this, due proceedings, based upon proper by-laws of a voluntary association, constitute due process of law as to members of such an association."

Sec. 55, Black on Benefit Societies, is to the effect that where a society acts in disciplining its members in conformity to its charter and within the powers of its rules and regulations, and the proceedings are not irregular, action of expulsion is conclusive and cannot be inquired into collaterally by mandamus or any other proceeding; that the society in such a case acts judicially and its sentence is conclusive, like that of any other judicial tribunal where there is no provision for review. When an expelled member resorts to a court of justice to compel reinstatement he does not appeal from the judgment, as courts have no appellate jurisdiction in such cases. All that the court can be asked to decide is whether the charge against

him was sufficient under the powers of the society and whether the necessary steps for his expulsion were regularly taken after notice and an opportunity to be heard accorded. All these essential elements being present in this case, the courts are without jurisdiction to review the order expelling petitioner.

The courts of review in this jurisdiction have in the main held to the doctrine promulgated by the text writers supra. In Creek v. High Court, etc., 162 Ill. 298, the court said, quoting from the Appellate Court opinion:

"Where the tribunal of a voluntary society proceeds regularly, - that is, in accordance with its own rules, they being not contrary to public policy or the law of the land, - and its procedure not being mala fides or repugnant to natural justice, the merits of a judgment thus rendered will not be inquired into collaterally."

The record discloses that the trial board proceeded regularly in accord with the rules of the alliance, that nothing they did was contrary to public policy or the law of the land nor mala fides or repugnant or contrary to natural justice.

In Leafe v. Women's Catholic Order of Foresters, 162 ibid, 78, it was said:

"Courts are always reluctant to interfere with the disciplinary powers of voluntary organizations, whether incorporated or unincorporated. * * Such interference will never be justified, unless the exercise of the power has been without jurisdiction, or marked by gross injustice and unfairness." Pitcher v. Board of Trade, 181 ibid 411; Green v. Case, 174 ibid, 585.

The Circuit Court erred in awarding the peremptory writ of mandamus and its judgment is therefore reversed but the cause is not remanded.

REVERSED WITHOUT REMANDING.

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24320

CITY OF CHICAGO.

Appellee,

vs.

WONG WAH.

Appellant.

210 I.A. 161

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HOLDEN

DELIVERED THE OPINION OF THE COURT.

Appellant was convicted in the trial court of a violation of Section 2807 of the Municipal Code and sentenced to pay a fine of two hundred dollars and costs of nine dollars, with the alternative sentence on failure to pay said fine and costs of imprisonment in the House of Correction of the City of Chicago for a period not to exceed six months.

Appellant has failed to file the record to the present March Term. Appellee has docketed the cause on a short record and has moved this court to affirm the judgment of the Municipal Court. For the reasons stated in an opinion coincidentally filed in case Gen. No. 24325, the judgment of the Municipal Court is affirmed.

AFFIRMED.

24321

CITY OF CHICAGO,
Appellee,

vs.

ABE KRISOLOFSKY,
Appellant.

210 I.A. 162

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HOLDEN
DELIVERED THE OPINION OF THE COURT.

Appellant was convicted in the trial court of a violation of Section 2267 of the Municipal Code and sentenced to pay a fine of fifty dollars and costs of six dollars and fifty cents, with the alternative sentence on failure to pay said fine and costs of imprisonment in the House of Correction of the City of Chicago for a period not to exceed six months.

Appellant has failed to file the record to the present March Term. Appellee has docketed the cause on a short record and has moved this court to affirm the judgment of the Municipal Court. For the reasons stated in an opinion coincidentally filed in case Gen. No. 24323, the judgment of the Municipal Court is affirmed.

AFFIRMED.

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24322

210 I.A. 163

CITY OF CHICAGO,
Appellee,

vs.

ISADORE COHEN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

Appellant was convicted in the trial court of a violation of Section 2012 of the Municipal Code and sentenced to pay a fine of one hundred dollars and costs of six dollars, with the alternative sentence on failure to pay said fine and costs of imprisonment in the House of Correction of the City of Chicago for a period not to exceed six months.

Appellant has failed to file the record to the present March Term. Appellee has docketed the cause on a short record and has moved this court to affirm the judgment of the Municipal Court. For the reasons stated in an opinion coincidentally filed in case Gen. No. 24323, the judgment of the Municipal Court is affirmed.

AFFIRMED.

24324

CITY OF CHICAGO,
Appellee,

vs.

JOSEPH SHORE,
Appellant.

210 I.A. 164

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE NOLDON
DELIVERED THE OPINION OF THE COURT.

Appellant was convicted in the trial court of a violation of Section 2807 of the Municipal Code and sentenced to pay a fine of two hundred dollars and costs of six dollars, with the alternative sentence on failure to pay said fine and costs of imprisonment in the House of Correction of the City of Chicago for a period not to exceed six months.

Appellant has failed to file the record to the present March Term. Appellee has docketed the cause on a short record and has moved this court to affirm the judgment of the Municipal Court. For the reasons stated in an opinion coincidentally filed in case Gen. No. 24323, the judgment of the Municipal Court is affirmed.

AFFIRMED.

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24325

CITY OF CHICAGO,
Appellee,
vs.
ROBERT PEARL,
Appellant.

210 I.A. 165

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE WOLDOM

DELIVERED THE OPINION OF THE COURT.

Appellant was convicted in the trial court of a violation of Section 2012 of the Municipal Code and sentenced to pay a fine of one hundred dollars and costs of six dollars, with the alternative sentence on failure to pay said fine and costs of imprisonment in the House of Correction of the City of Chicago for a period not to exceed six months.

Appellant has failed to file the record to the present March Term. Appellee has docketed the cause on a short record and has moved this court to affirm the judgment of the Municipal Court. For the reasons stated in an opinion coincidentally filed in case Gen. No. 24323, the judgment of the Municipal Court is affirmed.

AFFIRMED.

22 JUL 1992

24332

CITY OF CHICAGO,
Appellee,

vs.

HUGE EARLY,
Appellant,

210 I.A. 166

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HOLDEN

DELIVERED THE OPINION OF THE COURT.

Appellant was convicted in the trial court of a violation of Section 2012 of the Municipal Code and sentenced to pay a fine of two hundred dollars and costs of six dollars and fifty cents, with the alternative sentence on failure to pay said fine and costs of imprisonment in the House of Correction of the City of Chicago for a period not to exceed six months.

Appellant has failed to file the record to the present March Term. Appellee has docketed the cause on a short record and has moved this court to affirm the judgment of the Municipal Court. For the reasons stated in an opinion coincidentally filed in case Gen. No. 24323, the judgment of the Municipal Court is affirmed.

AFFIRMED.

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421 - 23766

W. L. CARWILE,
Appellee,

vs.

IRA M. COBE,
Appellant.

210 T. A. 167
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The complainant, W. L. Carwile, filed his bill of complaint in the Superior Court of Cook County against the defendant, Ira M. Cobe, in which bill of complaint he sought to reform a certain written instrument and obtain a decree against the defendant for the sum of \$10,000. A decree was entered in the cause in favor of the complainant for said sum on April 30, 1917, and the defendant brings the cause to this court by appeal for review.

The written instrument which furnishes the basis for the action was executed by Cobe, defendant, at Chicago, June 11, 1910, and by Carwile, complainant, at Pecos, Texas, on June 13, 1910. Prior to these dates the complainant had entered into a contract with one Swenson, under which complainant had agreed to construct a certain railroad from Pecos, Texas, to San Salomon Springs via Saragosa and Balmorhea, Texas, a distance of approximately 41 miles.

The evidence heard on the trial tends to prove that Swenson through financial difficulties was unable to complete the contract with complainant for the building of the road and that as a result of this fact the defendant Cobe was appealed to to take over the interest, in some measure, of Swenson, in the contract. As a result of negotiations Cobe entered into a contract with complainant

727-110

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Carwile, under which they agreed in writing that complainant was to be paid a bonus sum of \$10,000 for the completion of the railroad in question to Saragosa, Texas, on or before August 1, 1910, and a similar sum upon its completion to Balmorhea, a point seven miles beyond Saragosa on the line of the proposed railroad, on or before January 1, 1911.

At the time this contract was entered into the railroad had been constructed by complainant to a point about nine miles from Saragosa. That part of the contract which relates to the promise to pay \$10,000 on the completion of the railroad as far as Saragosa is as follows:

" * * * it being expressly understood and agreed, however, that no part of such ten thousand dollars (\$10,000) shall be paid or be due said Carwile unless said railroad enters Saragosa on or before August 1, 1910."

Prior to the execution of the contract, Carwile, as stated, had an agreement to build the railroad with one Swenson. Under this earlier contract it was agreed that Carwile was to be paid certain sums of money by way of bonus on his completion of the railroad to certain points within the times prescribed in this contract. The railroad was to run through certain largely unsettled farming lands in Texas, owned or controlled by Swenson and others, and it was for the purpose of selling and exploiting these lands that it was proposed to build the railroad. The railroad was not completed by complainant to Saragosa until August 17, 1910, and the matter in controversy is as to whether Cobe is now required to make this \$10,000 payment which the contract between the parties expressly provided was not to be paid to complainant unless complainant had completed the railroad to Saragosa on or before August 1, 1910.

The theory of complainant's bill is that the defendant, Cobe, "without the knowledge or consent of the

complainant, fraudulently changed, or caused to be changed, one of the clauses in said document, * * * so that the same reads as follows:

"After July 10, 1910; (d) out of the moneys realized from the sale of the two thousand and ten and thirty-one one-hundredths (2,010.31) acres of farm lands, shown more fully upon Exhibit A attached hereto, the sum of five dollars (\$5.00) per acre when the railroad from Pecos, Reeves County, Texas, is completed so that it enters the town of Saragosa, on all of said farm lands then already sold and on each sale thereafter as made and when deed therefor is delivered to the respective purchasers, until a total of ten thousand dollars (\$10,000.00) is so paid to the said Carwile from the moneys realized from said farm lands; it being expressly understood and agreed, however, that no part of such ten thousand dollars (\$10,000) shall be paid or be due said Carwile unless said railroad enters Saragosa on or before August 1, 1910."

In brief the complainant insists that the defendant fraudulently caused a change in the writing so that the date August 1, 1910, was inserted in the contract for the date January 1, 1911.

It is insisted on behalf of the defendant that the payment to be made on completion of the work required of complainant under the contract, on or before August 1, 1910, should be regarded as a bonus for completing the work within the time specified in the contract, and further that the evidence introduced on the trial does not tend to prove that the contract was in fact surreptitiously altered by defendant as changed in complainant's bill.

The evidence tends to prove that the period of time beginning August 1st was the most favorable time to bring prospective purchasers to the lands adjacent to the proposed railroad and that the delay in completing the work to August 17, 1910, was a matter of serious consequence to the defendant and others who had financed the building of the road.

The contract made by Cobe with the complainant was in substance similar to that originally made between complainant and Swenson. The contract price to be paid the complainant for the building of the railroad was definitely fixed in this contract. The bonus payments, however, were to be paid him only upon his completion of the work at or before the times specified in their contract.

Under the evidence in this case there can be small doubt that the \$10,000 payment was to be paid to complainant as a reward for his completion of the contract at or before the time specified therein. The refusal of defendant to make this payment was in no sense an attempt on his part to enforce a forfeiture as the trial court seemed to think. Indeed, the plaintiff's only theory, as we read the pleadings, is that by fraud on part of defendant the contract was made to read August 1, 1910, when in fact and by a prior agreement of the parties it should have read January 1, 1911.

Correspondence in the form of telegrams indicates that prior to July 10, 1910, Garwils and Levin, Cobe's attorney, had substantially agreed upon the terms of the contract which was subsequently executed. It is conceded that Levin in the original draft of the contract which was made by him inserted the date January 1, 1911, and it is insisted on behalf of defendant that this date was placed therein through error. It is further admitted that this date was changed to read August 1, 1910, before the contract was executed by either of the parties. Levin testified that the contract was drawn about June 3, 1910; that immediately thereafter he read it over and noticed a mistake of "June 1, 1911, and I had the stenographer correct it on all the copies I had, with the exception of the one I myself changed in ink for her

Submitted: 10 June 2009; Accepted: 17 July 2009

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and to make them more effective in the future.

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The authors would like to acknowledge the support of the National Science Foundation Grant DMR-9706845.

...and the ...

10. I am a member of the following organizations:

1. *Explain the importance of the following factors in the development of a country's economy:*

Source: *Journal of the American Statistical Association*, 1997, 92, 1033-1046.

Source: *Journal of the American Statistical Association*, 93(463), 1998, pp. 1039-1052.

and the other two are the same as in the first case.

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Source: U.S. Census Bureau, *U.S. Census of Population, 1980*, vol. 1, PC80-1, table 1-10.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Received 10 November 1999; accepted 10 November 1999

to his first settlement since he had to resign of 1903

—greatly appreciated. Best regards, I am, Yours truly and faithfully,

1911, I was 10 years old and lived in a small town in the state of New York.

guidance;* that his stenographer made the change in the date of the contract as directed by him. Aside from the fact that Levin acted in the matter as attorney for Cobe there is no evidence in the record tending to show that Cobe had authorized Levin to bind him to the terms of any contract other than that which was in fact executed by complainant.

The original contract between Swenson and Carwile provided for the payment to Carwile of a bonus of \$100,000 in monthly installments, beginning March 1, 1910, and this contract provided for the completion of the railroad to Palsorhea by June 1, 1910. On June 13, 1910, the railroad had been completed to within about nine miles of Saragosa. The evidence is clear that Carwile was unable to complete his contract with Swenson within the time specified in the contract, and hence the negotiations which resulted in the contract with Cobe.

It will be noted that Carwile on January 26, 1910, agreed with Swenson to complete the road from Pecos, Texas, via Saragosa to Palsorhea, a distance of approximately 36 miles, by June 1, 1910. The distance between Pecos and Saragosa is about 29 miles and at the time that Cobe and Carwile entered into the contract in question, June 13, 1910, the road had been constructed to within about nine miles of Saragosa. The evidence shows that on this date Carwile was in need of money; that construction work had been stopped upon the railroad and that Swenson was also in serious financial difficulties. It is admitted by Carwile that the parties representing Cobe and others had asked him to construct the railroad to Saragosa by August 1, 1910, although he now insists that he refused to so bind himself. There is much conflict in the testimony as to what was said at con-

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THE ABOVE-DESCRIBED PERSONS ARE THE ONLY PERSONS WHOSE NAMES ARE LISTED IN THE ABOVE-DESCRIBED DOCUMENTS.

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ferences in Chicago, to which Carwile was a party, before the execution of the contract, and if the question of fact under consideration was to be determined by the evidence heard in relation to these conferences, we would be disinclined to disturb the conclusion reached by the trial court. Whatever may have been said by the parties who were interested in the completion of the railroad, it is conceded that the contract when executed by the parties to it bore the date August 1, 1910. When the subject matter of this contract is taken into consideration and when consideration is given to the obligations which Carwile assumed under a prior contract with Swenson and in view of the undenied fact that it was of great importance to the defendant and other interested persons to have the railroad to Saragosa completed on or before August 1, 1910, it is not unreasonable to suppose that Cobe would not consent to the insertion in the contract of the date January 1, 1911; the evidence shows that Carwile stated that he would be able to finish the road to Saragosa on or before August 1, 1910.

Several persons who were supporting the enterprise and who were interested in the lands, which it was thought could be marketed if the road were built, most, if not all, of whom were creditors of Swenson and the Swenson Land Company, were anxious for a prompt completion of the work. Because of the difficulties hereinbefore referred to the work had already been delayed, and we think that it reasonably appears from all of the evidence in the record that prior to the signing of the contract in question all of the persons interested in one way or another in the construction of the railroad desired to have the work completed to Saragosa on or before August 1, 1910.

The Commission on the Status of Women, established in 1946, was the first international body to deal with the status of women. It was created by the Economic and Social Council of the United Nations. The Commission's mandate was to study the status of women in all countries and to make recommendations to the Council on measures to improve it. The Commission has since held numerous sessions and has produced a large body of work, including the Declaration on the Elimination of Discrimination Against Women and the Convention on the Elimination of All Forms of Discrimination Against Women.

Carwile testified that:

"If all of the material had been there I could have completed the road to Saragosa within ten days or two weeks after the 15th day of June. There was delay because of Bloch-Follak & Company. There wasn't everything done that I could have done to reach Saragosa by the first of August. There was a breakdown there. There were many reasons why I didn't get to Saragosa by the 1st of August. I do not remember all of them. The breakdown was one of them."

Later in his testimony on cross-examination this witness said:

"The breakdown couldn't have prevented our getting there by August 1st. * * *"

and his testimony was otherwise such that it is difficult to arrive at any other conclusion, even from his own testimony, than that he expected and intended to complete the road to Saragosa before August 1st and that he was prevented from so doing by occurrences such as those above referred to and the breaking down of two locomotives employed by him in the work.

It was further shown in the evidence that Levin, attorney for defendant, arrived at Pecos, Texas, on Friday morning, June 10th; that he carried with him the copies of the contract together with other papers; that he met Carwile about 9 o'clock that morning in the office of his, Carwile's, attorney, one Judge Ross; that he had left the copies of the contracts which Cobe was to sign with Cobe for examination and that Cobe was to send them to him at Pecos. Levin says that he handed Carwile and his attorney copies of the contract.

Ross, attorney for Carwile, with reference to what happened at Pecos said in substance that Levin had handed him, Ross, the copy of the contract which Carwile was to sign and which Cobe had mailed to Levin at Pecos; that he took the contract from Levin and glanced at the

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* From 1971 to 1974, the above information was furnished to the FBI

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10. The Commission has also received information from the Government of the Republic of the Philippines that the Philippine National Police (PNP) has been instructed to conduct a nationwide search for the subject.

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and the following between the two years, 1969, 1970

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opening lines of each paragraph; that he examined it only sufficiently to satisfy himself that "it was a copy of that which I had in my office all that time which had come through Mr. Winkler"; that on his advice Carwile signed the contract in his presence and handed it back to him, Ross; that the witness did not know that the date August 1, 1910, had been inserted in the contract; that he thereafter placed the contract in his safe; that Carwile signed the contract about two o'clock in the morning in Ross' office and that he, Carwile, was at the time anxious to leave Pecos City on a train departing therefrom shortly thereafter.

We think the evidence preponderates in favor of the contention that Carwile consciously entered into a contract for the completion of the road to Saragosa on or before August 1, 1910. A careful examination of the history of the whole enterprise as shown by the record leads one to the conclusion that there was every sufficient reason for this provision of the contract so far as the interests of the defendant Robe were concerned. The testimony of the complainant himself is definite that there was nothing inherently impossible or unreasonable about this requirement of the contract, and he testified that he could have completed the work within fifteen days. The contract was finally executed on June 13th; this would have given Carwile about 47 days to complete the work. Under such circumstances it is difficult to believe that the defendant or his attorney Levin would attempt to perpetrate a fraud such as is suggested here. At the time at which it is said the alleged fraud was committed both complainant and Levin had every reason to be-

opening lines of each paragraph; that he considered it only

reluctantly to admit that it was a copy of

that which I had in my office; that some time had gone

between Mr. [redacted]; that he had signed

the contract in his presence and that he was the

first; that the witness did not know that the date signed

1, 1910, had been entered in the contract; that he had

then placed the contract in his safe; that he had signed

the contract about two o'clock in the morning in 1910; that

there was that day, and at the same time in

have been this on a number of other occasions; that

thereafter

to which the witness responded in 1910

of the contract; that the witness had signed

contract for the completion of the road to be made in 1910

before March 1, 1911. A contract was made of the kind

copy of the contract was shown to the witness before

one of the witnesses that there was every witness

between the two parties of the contract of 1910 and 1911

copies of the contract were made and the witness

of the contract itself is definite that there was nothing

independently made or substantiated about this requirement

of the contract, and he testified that he could have completed

the contract in 1910; that the contract was finally com-

pleted on June 1, 1911; that the witness had signed about 19

days he completed the work. When the witness signed it is

difficult to believe that the defendant or his attorney had

would attempt to represent a fraud upon as is suggested here.

in the case of which it is said the witness found the con-

tract with [redacted] and the witness

lieve that there would be no difficulty encountered in completing the work on the railroad to Saragosa before August 1, 1910. In the absence of a sufficient motive for so doing it is not conceivable that Levin, a member of the bar, would undertake to practice a fraud, which, if discovered, might be followed by serious consequences to himself.

The complainant and his counsel had ample opportunity to examine this contract before its execution. Complainant's attorney says that he took Levin's word for it that it was copy of a paper which the witness said had been delivered to him by one Winkler, attorney for Carville. It does not appear from the evidence that Levin in fact knew of the contents of the paper delivered to Ross by Winkler, if Ross' testimony is to be believed. There is evidence which tends to prove that Ross had a copy of the contract in his possession three days before Carville signed the contract. But, in any event, it was Ross' duty and he had ample opportunity to examine the contract which he advised his client to execute. It is a fair argument that even if such fraud had been attempted, either Carville or his attorney would have discovered it before the execution of the contract and Cobe must have known, and we will assume that his legal adviser must have known, that if such fraud had been attempted it could have been set aside at once upon discovery.

The complainant asserts that during the conferences in Chicago he vehemently protested against the August 1, 1910, provision of the contract; that the parties, there being several in interest, all debated this question earnestly between them and that he gave more

There is a large amount of material in the files of the Department of the Interior, which is not being used in the present investigation. It is believed that this material is of great value in the investigation of the activities of the various groups and individuals mentioned in the report of the Special Agent in Charge, New York, dated June 1, 1940.

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THE UNIVERSITY OF CHICAGO

attention to this question than to any other. He signed the contract in question on the advice of his attorney without either he or the attorney looking at the contract for the purpose of determining whether the date for the completion of the work to Saragosa was correctly written into the contract in accordance with the prior agreement. No change was in fact made in the contract. The real issue of fact is whether the defendant or his attorney had procured the complainant to execute a contract to the terms of which he had never in fact agreed. Cobe and Carwile never met prior to the execution of the contract. So far as the evidence shows the contract which was drawn by Levin was submitted to both of the parties and each had the same opportunity to know of its contents before he signed it. While there was much discussion had between Cobe's attorney and Carwile and others with reference to the matter of building the railroad, no binding contract was executed by Cobe until the agreement in question was in fact signed by him.

The testimony of both Levin and Friend, the attorney who accompanied him to Pecos, is to the effect that Ross carefully examined the papers submitted to him and which were executed by Carwile. Carwile and Ross, his attorney, occupied the same suite of offices at Pecos and Ross kept the contract in his possession until September 10, 1910. Carwile, however, made no complaint about the matter in dispute until after he had completed on August 17, 1910, the construction of the railroad to Saragosa.

In Silurian Oil Co. v. Neal, 277 Ill. 48, the Supreme Court said:

... ..

and the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas, the Commission has decided to continue its investigation of the activities of the Committee for the Liberation of the Americas.

and of bringing a situation of mutual trust and honesty to
the fore, and of the fact that the only way to achieve this is by

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"There is, however, a strong presumption that when parties reduced their agreement to writing it expressed their intention, and to overcome the presumption that the writing is their agreement the evidence must be clear and convincing, and the court will never grant relief except upon the most satisfactory evidence and because of its evident justice and necessity * * * .

"A reformation can only be had upon clear proof that the alleged mistake was mutual, and the proof must be such as to leave no fair and reasonable doubt upon the mind that the instrument does not embody the final intention of the parties, but was executed under a common mistake and expresses what neither of the parties intended."

In the case of Lines v. Willey, 253 Ill. 440, 449, the Supreme Court said:

"The usual rule is, that where there is a written agreement the whole sense of the parties is presumed to be comprised therein. (Story's Eq. Jur., 12th Ed., Sec. 153.) Such instrument will not be changed unless fraud, accident or mistake can be established by the strongest and most convincing evidence. (Hunter v. Bilyeu, 30 Ill. 228; Carson v. Davis, 171 id. 497; Stanley v. Marshall, 206 id. 20; Koch v. Strueter, 218 id. 546.) If the mistake is conceded by both sides or proved by satisfactory evidence equivalent to an admission, courts of equity will not hesitate to reform a deed. The rule, however, forbids relief whenever 'the evidence is loose, equivocal or contradictory, or is in its texture open to doubt or opposing presumptions. The proof must be such as will strike all minds alike as being unquestionable and free from reasonable doubt.' (1 Story's Eq. Jur. 12th Ed. Sec., 157) The authorities all agree that parol evidence of the mistake and the alleged modification must be of such a nature that the resulting proof 'must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability nor upon a mere preponderance of evidence, but only upon a certainty of error.' (2 Pomeroy's Eq. Jur. 3d Ed. Sec. 859.) The authorities cited (including decisions of this court) by both of the learned authors just quoted fully sustain the conclusion they have reached."

In our opinion this case is far from meeting the requirements of the law as set down in the above authorities. To say the least it is doubtful whether the contract was changed as alleged in complainant's bill of complaint.

The decree of the Superior Court will be reversed and the cause will be remanded with directions to dismiss complainant's bill for want of equity.

DECREE REVERSED AND CAUSE

Remanded with directions

MARTHA NEVILLE, Appellee,

vs.

CHICAGO AND ALTON RAILROAD
COMPANY,
Appellant.

210 I.A. 168

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, Martha Neville, recovered a judgment in the Superior Court for the sum of \$1,000 against the Chicago & Alton Railroad Company, defendant. Suit was originally brought against the defendant company and one James Conway, who was employed by it on January 14, 1914, as a watchman.

In the declaration it was alleged that the defendant, James Conway, while in the course of his employment for the defendant company, had violently beat, bruised, struck and maltreated the plaintiff and that as a result of such ill treatment the plaintiff was seriously injured, etc. It was also alleged in a second additional count of the declaration that the defendant Conway had used unnecessary and unreasonable force and violence upon the body and person of plaintiff in pretending to place her under arrest, and that his said conduct "had been acquiesced in, ratified and approved by said company, with full knowledge of each and all of said wrongful and unlawful acts," etc.

On a trial of the issues presented upon the pleadings the jury rendered a verdict against both defendants for the sum of \$1,000. On motion of plaintiff a new trial was awarded the defendant Conway and the cause was dismissed as to this defendant. The motion for a new trial

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of the defendant railroad company was overruled and a judgment entered against it on the verdict and it seeks to reverse this judgment by appeal to this court. Plaintiff does not appear here in support of the judgment in her favor.

There was a decided conflict in the evidence introduced upon the trial. The testimony of witnesses for the plaintiff tended to prove that she went upon the tracks of the railroad company to rescue a dog belonging to her which had run upon the tracks; that she was met on the right-of-way of the company by the defendant Conway and was violently abused and assaulted by him. Six witnesses, including the plaintiff herself, testified to the manner of the alleged assault, and if the testimony of these witnesses is to be believed, the defendant Conway was guilty of a vicious and unwarranted attack upon the plaintiff. This testimony is in direct contradiction to that of eight witnesses who testified for the defendant. If the testimony of these latter witnesses be true, then Conway was guilty of no offense whatsoever. They testified that he had met the plaintiff under circumstances which authorized him to place her under arrest; that he had in fact merely taken her by the arm and led her from the property of his employer and cautioned her not to be again found on the railroad company's right-of-way.

Because of what is hereinafter said we do not deem it necessary to discuss the evidence or facts of the case with more particularity. The judgment of the trial court must be reversed for error in the giving of instructions, and with reference to the facts of the case it is only necessary to point out that there was a direct contradiction between the witnesses who testified for the respec-

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1. The first of these is the fact that the evidence is not in the form of a confession or admission. It is merely a statement of what the witness saw and heard. This is a common type of evidence in criminal cases, and it is often the only evidence available to the prosecution. The fact that the evidence is not in the form of a confession or admission does not make it any less reliable. It is simply a different type of evidence. The fact that the evidence is not in the form of a confession or admission does not make it any less reliable. It is simply a different type of evidence.

tive parties to the suit, and that it is far from clear that the weight of the evidence did in fact preponderate in favor of the material allegations of plaintiff's declaration. In this state of the record it was imperative that the jury should be carefully and accurately instructed as to the law applicable to the facts of the case. In C. R. & Q. R. R. Co. v. Van Fatten, 64 Ill. 510, the Supreme court said:

"In that class of cases sounding purely in damages, where the evidence is conflicting, and presents a difficult issue even to persons accustomed to investigate legal matters, the jury ought to be most accurately instructed. We know, from common observation, how apt they are, in cases where the recitals of the facts tend to touch their feelings, to seek for a reason that would justify them in finding a verdict in accordance with their sympathies. An improper instruction may often afford the desired pretext, and in all such cases no instruction which is calculated to mislead the jury into giving a verdict not warranted by law should be allowed to go to them."

On the subject of plaintiff's damages the court instructed the jury as follows:

"The jury are instructed that if you believe from the evidence that the defendants assaulted and beat the plaintiff in the manner and form as charged in the declaration, and that the plaintiff sustained damages thereby, then the jury are instructed that they should find a verdict in favor of the plaintiff and assess her damages at such sum as they believe from the evidence she is reasonably entitled to, and in this respect you are further charged that it is not necessary that any sum should have been named or mentioned in the evidence. The amount of damages, in case you find for the plaintiff, you are to ascertain, basing your finding upon the extent of the plaintiff's injuries, if any such are shown by the evidence, both her injury received at the time of the assault and battery, and any permanent injuries resulting therefrom, that the jury may believe from the evidence she has sustained. These are known as actual damages. And in case the jury believe from the evidence that the assault was wanton, reckless or vicious, and uncalled for in character, then the jury may add to such actual damages, if any such they find, such a sum as they may believe from the evidence would be reasonable and just, as smart money or punishment."

It is insisted that the evidence introduced

on the trial on behalf of plaintiff did not authorize the jury to find that the plaintiff had in fact sustained any permanent injuries. While the testimony of the physicians who testified for plaintiff is somewhat vague as to whether plaintiff sustained any permanent injuries as a result of the alleged assault upon her by the defendant Conway, we think that this testimony, when considered in connection with that of plaintiff and her two daughters, tended to prove that the plaintiff had sustained injuries permanent in their effects. The instruction is, however, faulty in other particulars. In its first sentence the jury were told that if they believed from the evidence that "the defendants assaulted and beat the plaintiff," etc., the jury might fix the damages, etc. It was not alleged, nor was it shown by the evidence, that the defendant participated in the alleged assault upon the plaintiff. It was averred in the declaration that the defendant company had acquiesced in, ratified and approved the conduct of the defendant Conway. The only evidence in support of this allegation is the conceded fact that Conway was an employee of defendant at and for some time after the alleged assault was committed. The form of instruction was misleading in that under it the jury might well have concluded that it could, under the evidence introduced on the trial, find that the defendant company had actually directed or participated in the assault upon the plaintiff.

The instruction is also defective in that it authorized the jury to assess plaintiff's damages, if any, "at such sum as they believed from the evidence she is reasonably entitled to." The instruction should have limited the right of recovery to the damages charged in the declaration.

The court also erred in giving to the jury the

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following instruction:

"The jury are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence."

The giving of this instruction has been held to be error in a number of cases. In De Joannis v. Domestic Engineering Co., 185 Ill. App. 271, the Supreme Court reversed a judgment for the giving of an instruction substantially similar to the one above quoted, and in Lyons v. Joseph T. Byersson & Son, 242 Ill. 409, the court held that "an instruction for the plaintiff advised the jury that the preponderance in a case 'is not alone necessarily determined by the number of witnesses,' and then follows an enumeration of the matters proper to be considered by the jury, omitting the number of witnesses testifying for and against," etc., and it was held error to give this instruction to the jury.

Also, we are inclined to think that there is much force in the argument that the defendant railroad company if liable at all to the plaintiff should be held so under the doctrine of respondent superior.

While it is alleged in the declaration that the defendant company had ratified and acquiesced in the alleged wrongful conduct of the defendant Conway, there is

no proof in the record to sustain this averment. The evidence shows that Conway continued in the employ of defendant after the occurrence complained of by the plaintiff, but this fact in and of itself was not sufficient to charge the defendant with knowledge of or acquiescence in whatever wrongful acts, if any, may have been committed by him. In considering this point it should be kept in mind that notwithstanding a verdict in her favor against Conway, the alleged wrongdoer, the plaintiff saw fit on her own motion to move for a new trial as against him and thereafter to dismiss the suit as to this defendant, leaving the defendant company solely liable for the alleged assault.

As stated, it is far from certain under the evidence introduced at the trial, that the defendant Conway did in fact commit the trespasses charged against him by plaintiff. He asserts, and his testimony is supported by that of a number of witnesses, that he did not in fact abuse or mistreat the plaintiff. His assertion of innocence finds strong support in the evidence. Now then can it be said at this time that the defendant company had knowledge of or that it had ratified his alleged misconduct? Excepting only the fact that a contract of employment existed between Conway and the company, the evidence wholly fails to prove that the defendant company in any way participated in the acts said to have been committed by him. Under such circumstances, to charge the employer not only with liability for the damages actually resulting from the conduct of its employee, but to inflict upon it further liability by way of punishment, in the form of exemplary damages, would be unfair and, we think, illegal. (Williams v. Bullman Palace Car Co., 3 So. 631; Bobb v. Simon, 97 N. W. 276; Berman

no proof in the record in which this was shown. The only
 source from which this information is derived is the testimony of the
 defendant, who is a person of good character and whose testimony is
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Berghoff Brewing Co. v. Przbylski, 52 Ill. App. 361.

The doctrine of respondent superior on grounds of public policy requires the master, in certain cases, to respond in damages for injuries resulting from the wrongful conduct of a servant. It is difficult to find any sufficient reason either in law or morals for extending this liability in cases where liability depends solely upon the contract of employment, so as to inflict exemplary damages upon the master for conduct which he neither authorized, ratified, nor participated in.

It is not urged here that there was any common intent or purpose which actuated both defendants. There was no concert of action, and if the defendant company is liable at all it is so solely because it was the employer of the defendant Conway, whose actions might well have been against its express orders and directions.

The liability of Conway, if any, was the result of his conduct; it did not in any sense depend upon his employment by the defendant company. On the other hand, the defendant company's liability rested solely upon the fact that it was the employer of Conway. In City of Peoria v. Simpson, 110 Ill. 294, it was held that -

"A judgment can not be sustained against the master and servant jointly in a case where the master is liable only upon the doctrine of respondent superior. The act of a servant is not the act of the master unless the act complained of is directed or adopted by the master. The master is not liable as if he had done the act himself, but because it is the policy of the law to protect the public by making him liable for the negligent acts of his servant, while the servant is acting within the scope of his employment. It is believed that this has been most generally held to be the law since it was so clearly stated by Lord Kenyon, C. J., in McManus v. Crichton, 1 East, 106."

There is no evidence in this record that the employer either directed or approved the alleged wrongful

THE HISTORY OF THE UNITED STATES

The history of the United States is a story of the growth of a great nation from a small colony of English settlers in 1607 to a powerful republic in 1776.

The first settlers came to the New World in search of a better life, and they found it in the fertile lands of the eastern coast.

As the years passed, the colonies grew in number and in power, and they began to assert their independence from the mother country.

The struggle for independence was a long and hard one, but it was worth the effort, for it resulted in the birth of a new nation.

The United States has since grown to be one of the most powerful nations in the world, and it has played a leading role in the history of the world.

The story of the United States is a story of the triumph of the human spirit over adversity, and it is a story that inspires us to strive for a better future.

The United States is a land of opportunity, and it is a land where every man, woman, and child has the chance to achieve his or her dreams.

The history of the United States is a story of the growth of a great nation, and it is a story that we should all be proud to share.

The United States is a land of freedom, and it is a land where every man, woman, and child has the right to live as he or she sees fit.

The history of the United States is a story of the growth of a great nation, and it is a story that we should all be proud to share.

conduct of its employee.

The judgment of the Superior Court will be reversed.

REVERSED.

505 - 23850

S. S. BERRY,
Appellant,
vs.
W. H. HEWITT,
Appellee.

210 I.A. 170

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff, S. S. Berry, a real estate broker, brought suit in the Municipal Court against defendant, W. H. Hewitt, on a written contract for commissions dated February 2, 1917. The contract in question is as follows:

"Chicago, February 2, 1917.

Mr. S. S. Berry,
29 S. LaSalle St.,
Chicago, Ill.

Dear Sir:

It is understood by and between us in consideration of your securing as a purchaser (and the deal going through) for my property at 5475-77 Kimbark Avenue, as indicated in the contract dated ~~2225555555555555~~ Feb. 13th, 1917. I will pay you as commission the sum of \$262.50.

Yours very truly,
W. H. Hewitt."

SSB:C

While the contract is dated February 2, 1917, it is conceded that it was not signed by the defendant until one or two days after February 13, 1917. The judgment of the trial court was in favor of the defendant and the plaintiff brings the case here by appeal for review.

It is insisted on behalf of the plaintiff that under the contract in question he was entitled to commissions as real estate broker so soon as he had procured a purchaser for the premises referred to in the contract. The defendant's position is that the plaintiff was not entitled, under the contract, to commissions until plaintiff had procured a

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person able and willing to purchase the property and until there had been a final consummation of the sale thereof.

The evidence introduced on the trial tends to show that the plaintiff had, for some time before the execution of the contract, endeavored to procure a purchaser of defendant's premises; that such negotiation was had with one C. E. Malm concerning an exchange of his property for that owned by the defendant. On February 12, 1917, the defendant wrote the plaintiff that he would terminate the negotiation unless plaintiff procured Malm to sign a contract for the exchange of the property within a short time. On February 13, 1917, plaintiff secured the signature of Malm to a contract which provided for an exchange of certain of his property for that of the defendant. A day or two thereafter the defendant called at the office of plaintiff and signed the contract for the exchange of the properties, and on the same day and immediately after executing the exchange contract he signed the contract for broker's commission above set forth.

While there is some contradiction in the evidence as to just what was said or done at the time this contract was signed, we think the court was warranted in finding from the evidence that the contract was executed as a result of the defendant's expressed determination to pay commissions to the plaintiff only in the event of a final consummation of the contract for the sale or exchange of defendant's property. The contract as originally drawn was typewritten and the words which were interlined in handwriting - "and the deal going through" - were written into the contract by the defendant before he signed it as a result of the oral agreement between the parties that the

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commissions were to be paid only in the event of the consummation of the sale.

The evidence shows that the deal was in fact not consummated; that Palm for some reason had refused to comply with the contract which he had entered into with the defendant, and aside from a consideration of what was said by the parties at the time of the execution of defendant's written agreement to pay commissions, this agreement could not, under the law, be modified by the oral statements of the parties. The contract expressly provided that commissions were to be paid plaintiff only in the event of the "deal going through." Without the insertion of these words in the contract the plaintiff would be entitled to commissions on his procuring a purchaser able and willing to purchase the property. The interlineation of the phrase referred to suspended plaintiff's right to recover upon the contract until such time as the deal was actually consummated and the defendant had, as a result of the efforts of the plaintiff, disposed of his property.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

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ELLEN BARRETT, Administratrix of
the Estate of Thomas E. Barrett,
deceased,

Appellee,

vs.

ANNIE MARSCHAK, Administratrix of
the Estate of Joseph Marschak,
deceased,

Appellant.

210 I.A. 171

APPEAL FROM COUNTY

COURT OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff recovered a judgment for \$1,000.00 in the County Court of Cook County in a suit on a replevin bond, and the defendant seeks by appeal to reverse this judgment.

The bond in question was given in 1904 to Thomas E. Barrett, then Sheriff of Cook County by Perfect Knitting Mills, plaintiff in the replevin suit, with defendant's intestate as surety on the bond. The judgment in the replevin suit was in favor of the defendant, which judgment was affirmed in this court. Perfect Knitting Mills v. Obstfeld et al., 154 Ill. App. 637. Suit was thereafter begun in the Municipal Court against Perfect Knitting Mills in the name of Strassheim, Barrett's successor in office. Judgment was entered in favor of the defendant and this judgment was affirmed in the Appellate Court. Strassheim v. Perfect Knitting Mills et al., 171 Ill. App. 601. On September 26, 1912, this suit was begun in the County Court against the administratrix of the estate of Joseph Marschak, surety on the replevin bond. On November 15, 1913, all the pleadings filed in the cause prior to that date were expunged from the record, except an amended declaration and amended plea thereto. A jury was waived and the cause was submitted to the trial Judge, who entered a finding and judgment in favor of the plaintiff. This

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judgment was reversed and the cause remanded by this court.

Barrett v. Marschak, 192 Ill. App. 481.

The case was redocketed in the County Court and an amended plea of res judicata was filed to the declaration. Replication was filed to the amended plea and a demurrer was sustained to the replication and judgment was entered in favor of the defendant, appellant here. This judgment was reversed and the cause was again remanded by this court to the County Court. Barrett v. Marschak, 204 Ill. App. 179.

On March 17, 1917, the case was again redocketed in the County Court. The demurrer to the replication was overruled. It was carried back to the plea of res judicata and sustained. The defendant thereafter asked leave of court to file what counsel for plaintiff insists were substantially the same pleas which had been considered by the trial court at different times from October, 1912, to November 15, 1913, on which latter date the pleas were stricken from the files on motion of the defendant. The motion to plead de novo was denied. The court, however, permitted defendant to file a plea puis darrien continuance, to which a demurrer was sustained. A trial was then had, which resulted in a judgment in favor of the plaintiff, and for the fifth time the cause is brought to this court.

As we view the record before us, we are called upon to determine whether the court erred in denying defendant leave to plead de novo to plaintiff's declaration and in sustaining the demurrer to the plea puis darrien continuance. The record before us shows that the pleas on file in the cause prior to November ¹⁵, 1913, were stricken from the files on motion of the defendant; prior to that date numerous pleas and demurrers had been filed in the cause and defendant had at different

Testimony was given by the witness who was present at the time of the shooting.

The case was referred to the jury and they returned a verdict of guilty. The case was then referred to the court for sentencing. The court sentenced the defendant to a term of years. The case was then referred to the court for sentencing. The court sentenced the defendant to a term of years.

On March 17, 1914, the case was again referred to the court. The court then sentenced the defendant to a term of years. The case was then referred to the court for sentencing. The court sentenced the defendant to a term of years.

As we view the facts before us, we are satisfied that the defendant is guilty of the crime charged. We therefore sentence the defendant to a term of years.

times and in various ways presented almost every conceivable defense to the declaration filed by the plaintiff.

It would be a thankless task to attempt to indicate in this opinion the tortuous course of the pleadings filed and the various orders entered in the cause prior to November 15, 1913. The litigation was originally begun in 1904 and during the 13 years that have since elapsed counsel for defendant have attempted to set up almost every kind of defense known to the law, in answer to the claim of plaintiff. It is evident that because of the confused condition of the pleadings in the cause, counsel on November 15, 1913, concluded that it would be in the best interest of defendant to rely upon a plea of res judicata, which was filed in the cause and on writ of error this court held the plea insufficient. Barrett v. Marschak, 204 Ill. App. 179.

It is our opinion that the trial court did not err in denying leave to defendant to file the pleas which defendant presented to the court, on its motion for leave to plead de novo. It is not easy to say much that is definite as a result of our examination of the record made in this suit. One thing, however, seems perfectly clear, and that is, that the defendant had ample opportunity to present any defense that she had or might have had to the action brought by the plaintiff, prior to the denial of defendant's request to plead de novo.

The pleas which defendant asked leave to file present substantially the same defenses made in the pleas which were stricken from the record on motion of defendant. These defenses, under the circumstances of the case, might well be regarded as having been abandoned when defendant on her own motion procured the trial court to strike them from the files. Prior to this appeal the case has been in this

times and in various ways, and almost every conceivable
defense in the imagination is used in the case.

It would be a long time before I could do more than

discuss in brief the various phases of the case.

First, the case is a very simple one, and is

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court four times. In Maren Coal & Ice Co., v. Howell, 217 Ill. 196, the Supreme Court stated:

"Parties cannot bring their cases to this court in piecemeal, but must raise all questions presented by the record upon the first appeal, by a proper assignment of error, which they desire the court to pass upon, or they will be deemed to have waived such questions and cannot be permitted to raise them upon a subsequent appeal. * * * He will not be permitted to have his cause heard partly at one time and the residue at another."

In Lusk v. Chicago, 211 Ill. 183, the court said:

"It is a well settled rule that when a cause is litigated and that litigation prosecuted to a court of appeals and passed upon, all questions that were open to consideration and could have been presented, relating to the same subject matters, are res judicata, whether they were presented or not."

However, the trial court permitted defendant to file a plea puis darrien continuance.

The trial court did not err in sustaining the demurrer to this plea, which set up that the plaintiff, Ellen Barrett, was not the administratrix of the Estate of Thomas E. Barrett, deceased. In support of her plea defendant urged that this suit is not the same suit that was originally commenced by the plaintiff; that the suing out of the writ of error was the beginning of a new suit by the plaintiff; that at that time plaintiff was not the administratrix of the Estate of Thomas E. Barrett, sheriff, who is named as obligee in the replevin bond and had not been such at any time since, and the defendant offered, in support of the plea, proof that the Estate of Thomas E. Barrett, deceased, was settled and the administratrix discharged July 27, 1910.

While it may be conceded that the suing out of a writ of error is the beginning of a new suit, we do not think that this fact in and of itself authorized the defendant to set up the defense made in her plea at the time the plea was filed. This defense, if good at all, was available

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to the defendant from July, 1910, to 1916, when the writ of error referred to was sued out. While as stated the suing out of a writ of error is the beginning of a new suit, it does not follow from that fact that the original proceedings have been entirely disposed of and when, as in this case, the judgment of the trial court, on writ of error, is reversed and the cause remanded, the proceedings and the suit stand precisely as if no writ of error had been issued. Stated differently, we think that the matter of defense set up in the plea did not arise since the last continuance of the cause. It was available to the defendant for several years, during which time the record shows she filed many pleas in defense of the action brought by the plaintiff.

We think there is also much merit in the contention of counsel for plaintiff that the recital in the plea that the plaintiff was not the administratrix of the estate of Thomas E. Barrett, deceased, was a mere conclusion of the pleader and that it was not a well presented fact which was admitted by the demurrer. But, in any event, an examination of the record discloses that the defense sought to be made by the plea in question was in fact presented by a plea filed in the cause October 15, 1912, to which a demurrer was sustained, and thereafter defendant pleaded over to the merits. The plea of October 15, 1912, was a plea in abatement and the defense set up therein was waived by the pleas to the merits.

The record of this case is such as to give cause for criticism that is sometimes pointed at the courts because of delay in procuring justice through legal proceedings. After wending its way through the courts for thirteen

years, and after numerous pleas have been filed in the cause, we are unable to discover that the defendant has in good faith at any time attempted to stand upon a meritorious defense to the action brought by the plaintiff. To reverse this judgment would, under the circumstances, amount to an admission that the law would not afford plaintiff a remedy in a case where it is not denied that the defendant's intestate became, by his voluntary act, a surety on the replevin bond.

The judgment of the County Court will be affirmed.

AFFIRMED.

which, and other measures, have been taken in the matter.
It was impossible to discover from the documents now in good
condition of any case elsewhere in which such a situation had
before us the action brought by the plaintiff. In the event this
incident would, under the circumstances, amount to an injury
also that the law would not afford remedy? A remedy in a
case where it is not decided that the defendant's negligence
became, by the testimony of a jury or the court, an injury.
The balance of the former cases will be as follows:-

1841-42

1841-42

HELEN J. THORNE,
Appellee,

vs.

ALCAZAR AMUSEMENT COMPANY,
a corp.,
Appellant.

210 I.A. 173

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant by this appeal seeks to reverse a judgment entered against it in the Municipal Court of Chicago.

Helen J. Thorne, a colored person, brought suit in the Municipal Court against the defendant, Alcazar Amusement Company, a corporation. A statement of claim filed by the plaintiff is in the form of a common law declaration; it consists of five counts and in each of the counts it is averred in different forms that the defendant "at to-wit, Cook County aforesaid" on November 24, A. D. 1914, violated Sections 42 I and 42 J of the Criminal Code, (Chap. 38 - Murd's Rev. Statutes.)

Section 42 J of the Criminal Code is as follows:

"Penalty for violating the provisions of this act.) Par. 2. That any person who shall violate any of the provisions of the foregoing section by denying to any citizen, except for reason applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense, forfeit and pay a sum of not less than twenty-five (25) dollars nor more than five hundred (500) dollars to the person aggrieved thereby, to be recovered in any court of competent jurisdiction, in the county where said offense was committed; and shall also for every such offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not to exceed five hundred dollars (\$500) or shall be imprisoned not more than one year, or both; and provided, further, that a judgment in favor of the party aggrieved or punishment upon an indictment, shall be a bar to either prosecution respectively."

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The suit of the plaintiff was to enforce a statutory penalty for wrongfully refusing to permit her to occupy a seat in a theater operated by the defendant, for which she had purchased and received a ticket. The suit was brought to recover a penalty under the above quoted section of the statutes. The statute in question defines and provides a punishment for the commission of what is essentially a criminal offense. Plaintiff does not bring her suit for a violation of her contract with the defendant; it is expressly based upon the statute in question, and hence, though the proceeding is civil in form, it was brought to recover a penalty for the commission of a criminal offense.

It is charged in each and all of the counts of the statement of claim that the offense was committed in Cook County. The Municipal Court of Chicago is a court of limited jurisdiction. It has no jurisdiction to impose penalties for criminal acts committed beyond the limits of the City of Chicago; its jurisdiction to try criminal cases must expressly appear in the information or the pleadings upon which they are tried. Miller v. People, 230 Ill. 65. Ulrich v. People, 137 Ill. App. 85.

The Municipal Court having no jurisdiction to impose a penalty upon the defendant for an offense alleged to have been committed in Cook County, the judgment of that court will be reversed.

REVERSED.

DIMITRIOS J. TOMFARY, GEORGE
TOMFARY and PETER TOMFARY,
doing business as TOMFARY BROS.,
Appellees.

vs.

PETER GIOVAN and CONSTANTINE
GIOVAN,
Appellants.

210 T.A. 174

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court for \$2318.18 in favor of the plaintiffs and against defendants.

In a statement of claim filed by plaintiffs in the trial court it was alleged that the defendants were indebted to plaintiffs in the sum of \$2,568.18, being a balance due plaintiffs under a building contract entered into on January 10, 1914, under the terms of which the plaintiff had agreed to build for the defendants a certain building in the City of Chicago. A considerable part of the above total sum claimed to be due plaintiffs is for extra work and material which plaintiffs claim were furnished defendants in connection with the performance of the contract.

The jury which tried the case returned a verdict for the sum of \$2,318.18 and interest. On the return of this verdict the court directed the jury to retire and bring in a verdict for the whole amount which the jury might find to be due plaintiffs and to exclude from the verdict the words, "with interest." The jury retired and again brought in a verdict against the defendants for the sum of \$2,435.05. This verdict was entered. Later plaintiffs remitted the sum of \$116.87 from the amount of the last verdict, which reduced the verdict to the sum of \$2,318.18, the amount which the jury found in the first

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verdict was due the plaintiffs, less interest. Quite clearly this remittitur represents interest which the jury attempted to allow plaintiffs on the sum found to be due it from defendants. Only one verdict was entered in the cause. While the jury attempted to allow interest in favor of the plaintiff the court properly held that such allowance could not be made under the pleadings in the case. As said in Tomlinson v. Earnshaw, 112 Ill. 311,

"In such cases there can be no useful end subserved by sending the case to another jury. The issues of fact are correctly settled and the error is one of law only, and in no wise affecting the merits of the verdict in any other respect."

The defendants were in no way prejudiced by the irregularity complained of.

It is insisted by defendants that there was serious and avoidable delay on the part of plaintiffs in completing the work required under the contract. The contract in question was made on January 10, 1914, and it provided that the building to be constructed by plaintiffs was to be turned over to defendants in a completed condition on or before March 30, 1914. The evidence tends to prove that the building in fact was not completed until some time in November, 1914. There is a sharp conflict in the evidence as to what caused this delay, but as the defendants have failed to prove any damages resulting to them from this delay, it will not be necessary to consider the general question of whether defendants did or did not suffer damages thereby, except as hereinafter noted.

Included in the claim of plaintiffs was an item for alley paving, amounting to \$74.59. It is asserted that this should not be allowed to plaintiffs for the reason that the work was defective. The contract provided that the

plaintiffs were to restore any places in the alley pavement disturbed or broken in the construction of the alley. This plaintiffs assert they did, and that the charge of \$74.59 was in fact for a 2' x 85' strip added to this pavement at the request of one of the defendants. Whether the work in repairing the alley paving was well done and whether the charge for the additional paving was reasonable, were questions for the jury under the evidence in the case.

Defendants also insist that a charge of \$180 for pumping water out of the basement was unreasonable, and that the doing of this work was an implied part of the contract, which required the plaintiffs to perform excavation work for the foundations of the building. The evidence offered by plaintiffs tends to prove that at the time the contract was executed and the work begun thereunder, the defendants occupied a building situated on the center of a lot which was to contain the new building; that under the agreement the defendants were to occupy the old building until such time as a part of the new building was erected sufficient to enable defendants to move therein. Plaintiffs assert that the charge was made for the pumping of water out of the basement of the building under construction because defendants had permitted water pipes in the old building to leak, which fact caused a flooding of the basement under a part of the new building. Here again we have a disputed question of fact. The testimony of the parties in relation thereto is not in all respects reconcilable. We think that this item, as also a charge of \$120 against defendants for retarding the work which plaintiffs were required to do under the contract, were questions for the determination of the jury.

The same answer might be given to all of the

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation.

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questions of fact presented in the brief filed by counsel for defendants. It is asserted therein that in addition to the foregoing the jury improperly allowed an item of \$200 for the construction of a temporary roof and a further item of \$564 for the work performed in the construction of the building which plaintiffs assert should have been figured on the basis of the height of the building as shown by a front view plan, and not, as contended by defendants, upon a sectional or scale plan. There was also a definite contradiction between the witnesses as to these two items, and evidence was introduced in support of the theory of each party with reference thereto. While it is insisted that none of the items charged for extra work was authorized under the contract and that defendants had not by order or otherwise rendered themselves liable therefor, we think the questions in relation thereto were properly submitted to the jury.

The contract between the parties provided for the selection of an architect to superintend the doing of the work under the contract. As a matter of fact, the evidence shows that the work done was under the direct superintendence of the defendant Constantine Giovan.

The defendants sought by counter claim to charge the plaintiffs with a total sum of \$1,337.40, because of the alleged negligent and insufficient manner in which the plaintiffs performed part of the work required of them under the contract.

The defendants insist that under the specifications for the doing of the work the basement floor was to have a thickness of 6-3/4 inches, and that the floor when completed by plaintiffs was from 2 to 3-1/2 inches thick. The plaintiffs say, however, that they bid on the plans for the building

which provided that the floor was to be 4 inches thick, and that it was constructed in substantial compliance with their contract. The evidence as to the actual thickness of the floor is in conflict.

Numerous other matters are urged by counsel for defendants wherein it is asserted that plaintiffs had failed to comply with the terms of the contract, as to some of which there does not appear to be much merit or substance. As to all of these items we think the subjects were matters for the determination of the jury.

The itemized claim of the plaintiffs was for \$2,568.18, and the verdict of the jury in favor of plaintiffs was for \$2,318.19. It is evident that some allowance was made by the jury to the defendants, either on their counter claims, or in support of their denial of certain of the claims made by plaintiffs.

Under the terms of the contract it was provided that in case of dispute between the parties the matter in dispute was to be referred to a board of arbitration, to be selected one person by each, and the two so selected were to select a third member. The evidence tends to prove that the plaintiffs on November 16, 1914, presented one Brisch as their representative on the proposed arbitration board, to decide matters then in controversy between the parties, and that the defendants refused or neglected to select their representative to arbitrate the matters, as provided by the contract.

Suit was begun January 4, 1915, and on December 18, 1916, nearly two years thereafter, the defendants for the first time set forth their specific claims against plaintiffs. We think, on the whole record, the judgment of the Municipal Court should be affirmed. There was sufficient evidence to

has been made a part of the report and the following information
has been furnished to the Bureau of Investigation and is being
sent to the Bureau of Investigation and is being sent to the Bureau of Investigation

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-19-2006 BY 60322 UCBAW/SJS

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1. The Commission has received information from the Government of the United States of America that the Government of the United States of America is in the process of conducting a study of the effects of the use of nuclear energy in the field of agriculture. The Commission is interested in the results of this study and in the methods used in its conduct.

and was begun January 8, 1913, and on November 15, 1913, under the name International Ice Commission and the first time the name Arctic Council appears (1913-1914) in regard to the Arctic region. In 1915, the Arctic Council was formed. There are various sources to

support the evident conclusion of the jury that the defendants permitted work to proceed on the building without objection as to its kind or quality. The defendant Constantine Giovan actually superintended the doing of the work and there can be but small doubt that he had ample opportunity to know of and to object to any failure on the part of the plaintiffs to comply with the terms of the contract. In their counter claim the defendants claim the total sum of \$28,391.10 as damages resulting to them from the manner in which plaintiffs performed the contract; and this notwithstanding the fact that the contract price for the building, including the extras claimed by plaintiffs, amounted in all to only \$17,397.70. We are unable to say, from our examination of this record, that such allowance as was made to defendants was insufficient to recompense them for whatever, if any, damages resulted to them from an alleged failure on the part of the plaintiffs to comply with the terms of the contract.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

107 - 23446

THOMAS SKRUZEWSKI,

Appellee,

vs.

ANDREW RYBARCZYK,

Appellant.

310 I.A. 180

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an action in assumpsit brought in the Municipal Court by appellee (plaintiff) against appellant (defendant) for labor as a farm hand. Trial was had without a jury and the court entered a judgment for the sum of \$183., and costs, in favor of the plaintiff. From that judgment defendant prosecutes this appeal.

The evidence of the plaintiff is to the effect that he went to work on defendant's farm on May 27, 1915, and worked until March 29, 1916, on an agreement that he should receive \$20 a month; that he received no money from defendant until Labor Day, when he was paid the sum of \$10.; that later defendant paid him \$7 and has paid nothing further. The defendant testified he told plaintiff, when he hired him, in Zwifka's saloon, in the presence of the saloon-keeper's wife, and the witness Martha Wiland, that he did not have much work for him, but if he wanted to take \$5 a month he would hire him; that plaintiff was not much good at ploughing or driving horses; that after the grain was harvested plaintiff had nothing to do except feed three

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Journal of Management Studies, 2006; 49(7): 1083–1093

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horses and milk two cows; that when he gave him \$10 near Labor day, he did not work thereafter for a week; that he bought clothes, whiskey, tobacco and other things amounting in value to \$16 for him and paid him, also, from time to time, small sums of money, making a total of \$48. The plaintiff denied that the defendant gave him money to buy clothes, tobacco and whiskey. One John Klazik, a witness for the plaintiff, testified that during the summer of 1915, defendant told him not to talk with plaintiff and keep him from his work as he (defendant) was paying him \$20 a month and wanted to keep him busy. Four witnesses testified for the defendant and corroborated his statement that the agreed wages were \$5 a month.

On the conclusion of all the evidence the court entered a judgment against the defendant for the sum of \$183. It is urged by defendant, as a ground for reversal, that the "finding was contrary to the greater weight of the evidence"; and, that the "finding is for an excessive amount and as the result of sympathy for the plaintiff on the part of the trial judge." It is always a difficult question for this court to pass on the credibility of witnesses, having no chance to hear them or see them, and having before them but the written words. It is hardly necessary to call attention to the fact so often referred to, or to the many decisions on that subject, that the trial judge sees the witnesses, hears their testimony, and is, therefore, in a much better position to decide all matters of testimonial credibility than we are. Counsel urges that, in the instant case, the number of witnesses for the defendant is so much greater than the plain-

tiff's that that alone should control, but such is not the rule. The preponderance of evidence is not necessarily to be determined by the number of witnesses. Maggart v. Peoria Ry. Co., 179 Ill. App. 229; Hopkins v. Chicago City Ry. Co., 178 Ill. App. 656; Kravitz v. Chicago City Ry. Co., 174 Ill. App. 182; Hachett v. Chicago I. & L. Ry. Co., 170 Ill. App. 140.

Objection is made that the court refused to allow counsel for appellant to make an argument. Inasmuch as the cause was submitted to the court without a jury and involved a simple matter of fact, we are of the opinion that such a refusal did not, under the circumstances, constitute a breach of discretion.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

132 - 23472

JEREMIAH J. LAUGHLIN,

Appellee,

vs.

CARROLL A. TELLER,

Appellant.)

210 I.A. 181

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment in the sum of \$110.00, recovered by appellee for the balance due upon a check for \$210.00.

Appellant, Carroll A. Teller, owner of a drug store (and also a lawyer) employed W. L. Houseman as manager and authorized the latter to keep an account in the Englewood State Bank, upon which checks could be drawn, signed "Teller Pharmacy, per W. L. Houseman." Appellant admits that he opened the bank account for the purpose of giving Houseman a limited authority to sign checks for the purpose of paying charges against the drug store. About April 15, 1916, appellee, (Jerry Laughlin) a policeman, was called up on the telephone by Houseman and told by Houseman that he, the latter, had to pay some express money orders; (the drug store conducted an agency of the American Express Company) that his partner was out of town and he had to have the money the next day, otherwise the office would be closed. Appellee, who was of the opinion that Houseman was a

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partner in the drug store, then sent Houseman \$210.00, and received a check dated April 20, 19¹⁶, for \$210.00. The check was duly deposited and then, on April 29, 1916, returned stamped "Not sufficient funds." Appellee then saw Houseman and the latter advised presenting it again. That was done and the bank again marked it "Not sufficient funds." Appellee returned to Houseman; the latter called up the Bank and asked how much money was on deposit, and then gave appellee a new check for \$100.00, which appellee presented and cashed. Subsequently, Houseman got another check for \$50.00, but, upon presentation, it was returned marked "Account closed." On December 20, 1916, the Drug store was closed up. The electric sign in front of the store was "Teller's Pharmacy." Prescriptions, according to appellee, were signed, "W. L. Houseman, Manager." Although appellant admits he paid the American Express Company, on April 17, 1916, \$403.50, and closed out that account, he claims that Houseman did not, on April 15, 1916 - the time Houseman got the \$210.00 from appellee to pay some express money orders - give him, appellant, any money with which to pay express company orders.

Appellant contends that he is not liable because the check was drawn for Houseman's own debt. The evidence, however, shows that Houseman was authorized to sign checks just as the one sued on was signed and to draw on the account that was described therein and so it follows that appellee - having no knowledge that it was a fraud or for Houseman's personal use - was justified in accepting it at its face value, and it does not now lie in the mouth of appellant to dispute it. It is a plain case of estoppel. Under the circumstances appellee was not bound to investigate

particular in the drug store, then from November 1917, 1918,
and received a check from April 1918, 1919, for \$111.00.
The check was duly cashed and then, on April 1918, 1919,
returned stamped "Not sufficient funds." Applicant then
saw Honeman and the latter advised presenting it again.
That was done and the bank again returned it "Not sufficient
funds." Applicant returned to Honeman; the latter picked
up the bank and asked how much money was in Honeman's
then gave applicant a new check for \$111.00, which applicant
presented and cashed. Subsequently, Honeman got another
check for \$111.00, but, upon presentation, it was returned
marked "Account closed." On December 1918, 1919, the bank
store was closed up. The electric sign in front of the
store was "Electric Supply." Honeman, Applicant,
to applicant, were signed, W. L. Honeman, Manager.
Although applicant admits he paid the Applicant Express
Company, on April 1918, 1919, \$43.00, and closed out that
account, he admits that Honeman had not, on April 1918,
1919 - the time Honeman got the \$111.00 from applicant
in the same manner as before - electric supply,
any money which would be pay express company order.
Applicant certainly paid or is now liable because
the check was drawn for Honeman's own debt. The evidence,
however, shows that Honeman was authorized to sign checks
just as the one used on one signed and to draw on the ac-
count that was described therein and as it follows that
applicant - having no knowledge that it was a check or for
Honeman's purpose, and - was justified in accepting it
as the bank order, and it was not his in the matter
of applicant in Honeman's. It is a plain case of fraud.

at his peril what Houseman contemplated doing with the money. The check, according to the authority given by appellant, was regularly signed, and it was on a bank account which appellant himself had created and given Houseman authority to draw on. Further, the trial judge may have been of the opinion, from the evidence - and reasonably - that the money was obtained by Houseman to pay an indebtedness due from the drug store to the American Express Company, as testified to by appellee, and under those circumstances there could be no question as to the liability of appellant. The contention that the trial court erred in the admission of certain evidence is untenable. Considering all the evidence as it appears to us in the record, we are of the opinion that the judgment should be affirmed.

AFFIRMED.

ANTON J. GERMAK, Bailiff of
the Municipal Court of Chicago,
for the use of Mabel Bowman,

210 I.A. 187

Plaintiff in Error,

ERROR TO

vs.

MUNICIPAL COURT

OF CHICAGO.

CHICAGO BONDING AND SURETY COMPANY,
and JOHN B. MATHESON,

Defendants in Error.)

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

The plaintiff in error having brought suit upon a replevin bond, the question arises whether or not there was a return of the property to the original owner. The defendant in error, John B. Matheson - having brought suit in replevin against Mabel Bowman for certain household furniture - together with the Chicago Bonding and Surety Company, gave a replevin bond (November 13, 1914) in the sum of \$500., which provided that he should return the property if the court so awarded "and save and keep harmless the said bailiff in replevying the said property and pay all costs and damages occasioned by wrongfully suing out said return of replevin." On November 13, 1914, the property was delivered to John B. Matheson pursuant to the writ of replevin. On December 31, 1914, in a trial of the replevin suit in the Municipal Court, the right of replevin was found not to be in Matheson. Accordingly, judgment was entered that Mabel Bowman recover from the plaintiff, the possession of the property in replevin, and that

781 A.I.O.S.

1. The first part of the report is a general introduction to the project, which includes the objectives, scope, and methodology. This section also provides a brief overview of the background and context of the study.

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© 2005 Blackwell Publishing Ltd *Journal of Internal Medicine* 258: 111–117

• *Journal of the American Medical Association*

Journal of Interpersonal Violence 26(10)

...and even last February, he found only 11 of them

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to 1957 and 1958. It is suggested that the following be done:

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WIFE OF JOHN ROBERT WATSON, JR. 1861-1901

a writ of retorno habendo be issued for the return of said property. The defendant was also given one cent damages and costs.

The personal property which was replevined, consisted of the household furniture which furnished a flat in which Mabel Bowman, her brother and her sister lived, which flat she rented from Matheson, though upon this point the evidence is vague. When the writ of replevin was issued the bailiff went to the flat and took possession of the flat and furniture. After the trial of the replevin suit and the order of the court that the property be returned, Mabel Bowman went to the premises and was told by someone there, who said he was a bailiff, that she could not go in. Subsequently, however, she entered and took some of her clothes, but never obtained any of the furniture. Her evidence is to the effect that after the furniture was taken and she was put out of possession of the flat, being told by the bailiff that she could not enter, she was never told that she could get the furniture back nor that it was at her disposal, and that she never said she did not want it nor that she would not take it. Evidently while the bailiff was in possession of the furniture in the flat Mabel Bowman was kept out of possession.

The evidence of Matheson is to the effect that after the replevin suit he told her that she could have all the goods back; that after he told her she could have the goods he kept the flat locked and paid the rent; that part of the time he had somebody there; that he never instructed anyone that she should not be admitted to the flat; that he never put her out of possession of the flat and never saw her after the replevin suit; that on April 30, when the

lease of the premises ran out, of which the flat was a part, he put the goods in storage; that he never personally used the furniture after the court ordered him to return it; that he never lived in that flat; that when the lease expired he did not tell her to go there and take the furniture; that he took the furniture out and stored it; that he did not tell her where it was stored. The evidence of Mabel Bowman is to the effect that she was never offered and never got back the furniture.

It seems difficult to understand how the trial judge arrived at the conclusion that a tender of the return of the property was made. There is nothing pertinent or material in the evidence of the witness Shurburne, and as to the testimony of Matheson, it is that "when the judge said I should give this woman back her furniture I told her she could have all the goods back and the automobile too. I told her where I could get them. They were at the same place"; that the goods remained there until he had them taken out and stored; that, meanwhile, he had kept the flat locked and paid the rent. On the other hand the evidence of Mabel Bowman was to the effect that when she went home to her flat in the evening, after the replevin suit was begun, the bailiff was at the door, evidently in possession, and told her that she could not go in, and that after the writ of retorno habendo was ordered, she was never told that she could get the furniture nor that it was at her disposal; that she was told she could go there for her clothes, which she did, and got them, but that she was watched while she was taking them; that all the furniture was there; that she was not told that she could take anything else. Obviously there never was a return of the pro-

perty. Even the evidence of Matheson himself does not warrant the conclusion that there was such a return of the property as the law contemplates. When the writ of replevin was originally levied and she went home in the evening, she found the bailiff in possession of the premises and of her furniture, and she herself was refused admission and had to go elsewhere to live, so that when, subsequently, the court ordered the property returned to her, it cannot be said, under the circumstances in this case, bearing in mind what the evidence shows, that what was done by Matheson constituted a sufficient return.

For the reason that the evidence does not show a return of the property pursuant to the writ, the cause is reversed and remanded.

REVERSED AND REMANDED.

JENNIE MURPHY, as Administratrix
de bonis non of the Estate of
Patrick Murphy, deceased,

Plaintiff in Error.

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

Defendant in Error.

210 I.A. 188

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

This is an action brought by Jennie Murphy, administratrix de bonis non of the estate of Patrick Murphy, deceased, to recover damages for the wrongful death of the deceased, against the Chicago, Milwaukee & St. Paul Railway Company, and the Car Loading and Unloading Association. The case has been tried three times. The first trial resulted in a verdict in favor of the plaintiff and against the Car Loading and Unloading Association for \$10,000, and a verdict of not guilty as to the railroad company. The verdict was set aside and a new trial granted. The second trial resulted in a verdict in favor of plaintiff and against the Car Loading and Unloading Association for \$6,000, and a verdict of not guilty as to the railroad company, and the third trial resulted in a verdict in favor of plaintiff and against the Car Loading and Unloading Association for \$7,525, and again the railroad company was found not guilty. Plaintiff moved that the verdict as to the railroad company be set aside and a new trial granted. The motion was overruled.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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It is noted that the report of the railway company is not a true and correct statement of the facts.

and judgment entered on the verdict, to reverse which plaintiff prosecutes this writ of error.

[The declaration consisted of two counts. The first averred that the railroad company was operating a steam railroad, and in connection therewith owned a certain warehouse, located in Chicago near its tracks; that the Car Loading and Unloading Association was engaged in loading and unloading merchandise to and from the cars; that the deceased was a teamster employed by the Joseph Stockton Company; that in the performance of his duties he was receiving a load of paper from the warehouse; that it was the duty of the defendants to use proper care so as not to subject the deceased to unnecessary dangers; that the railroad company not regarding its duty suffered the floor of the warehouse to be out of repair; that it was rough and worn, and there was divers holes and openings therein; that the Car Loading and Unloading Association was delivering to the deceased a heavy roll of paper, weighing about 700 pounds by means of a truck; that it so carelessly operated the truck that the roll of paper slipped and fell off the truck and struck the deceased, causing severe injuries, resulting in his death; that the accident was the result of the combined negligence of the defendants.

The negligence charged in the second count was that the two defendants suffered a certain iron plate on the floor of the warehouse to project and be in a dangerous and unsafe condition; that the defendants negligently drove and pushed a certain truck loaded with a heavy roll

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of paper against the iron plate, in consequence of which the paper slipped and fell and injured the defendant, as a result of which he died.]

The undisputed evidence is that the railroad company owned the warehouse and had the exclusive control of it, including the floor; that the Car Loading and Unloading Association alone did the loading and unloading, and that the railroad company had nothing to do with the trucking of the paper roll in question. The evidence tends to show that the floor had been in use for a number of years and was worn in places so that it was not smooth but uneven; that there was an iron plate fastened to the floor by means of nails or bolts and extended across the floor at the doorway through which the paper roll was being delivered, and was about one-fourth of an inch in thickness; that the nails and bolts in the inner edge of this strip were loose, which permitted the edge to turn up, some of the witnesses stating about a half an inch and others an inch and a half; that there was a worn place or hole in the floor just inside the strip, which was estimated by the witnesses to be from a half an inch to an inch and a half deep; that the paper roll was placed on an ordinary two wheel truck and was being trucked across this plate to the wagon outside where the deceased was standing; that the roll weighed from 700 to 1000 pounds; that when the truck was passing over the iron strip one of its wheels dropped into one of the holes in the floor, causing the roll of paper to fall off and strike the deceased. There was also evidence tending to show that it was customary in loading paper similar to the roll in question to have two men assist in holding the roll on the truck while

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Intelligence Service in the United States.

and others at that time; that there was a large
group of people in the room; that there were many
people standing by the windows; that the room was
filled with people; that the room was very
crowded; that the room was very noisy; that
the room was very hot; that the room was very
dark; that the room was very dimly lit; that
the room was very poorly ventilated; that the
room was very uncomfortable; that the room was
very unpleasant; that the room was very
unpleasant; that the room was very unpleasant;

There are also witnesses according to whom that it was the same person who was seen in the vicinity of the building on the night of the fire.

it was being trucked to the wagon.

Complaint is made to instructions Nos. 1, 2, 4, 5, 6, 7, 8 and 12, given at the request of the railroad company.

Instruction No. 1 told the jury that under the law they could not hold one defendant liable for the negligence of the other, nor were they at liberty to find both defendants guilty on evidence which showed the guilt of but one defendant. It is contended that this instruction is misleading and erroneous in that it might divert the minds of the jury from the evidence which tended to prove that the negligence of the railroad company contributed to the injury, and in combination with the negligence of the other defendant was the efficient cause of the injury. The railroad company was entitled to an instruction presenting its theory of the case, and we do not believe the instruction tended to mislead the jury.

Complaint is made of instruction No. 4, because it told the jury that the railroad company was not required to furnish a floor in absolutely perfect condition, but if the jury believed from the evidence that the floor was of such ordinary character as reasonably prudent persons in the exercise of ordinary care would maintain for such purposes, then the railroad company should be found not guilty. The objection seems to be in the use of the word "character", and it is argued that the question for the jury was not the character of the floor but the condition in which it was maintained. We think this objection is exceedingly refined and without merit. A further ob-

it was being furnished to the witness.

Witness: I have no recollection of that.

Q. A. O. V. 3 and 4, given as the contents of the letter.

THE WITNESS

Interrogation: Now I said you said that when the

law firm would not hold and defendant might not be
notification of the other, you were then at liberty to
with defendant's belief in defendant's belief and the
of her own testimony. It is understood that this testimony
then is necessary to establish in that it is also given
the kind of the fact from the evidence which comes to
prove that the negligence of the railroad company was
therein is the injury, and in connection with the neg-
ligence of the other defendant was the efficient cause
of the injury. The railroad company was entitled to an
instruction providing the theory of the case, and we do
not believe the instruction should be mislead the jury.

Completion of the case of instruction No. 4, because

is told the jury that the railroad company was not re-
quired to furnish a list in immediately pasted condition
but it was fully satisfied from the evidence that the other
was of such ordinary character as to be reasonably prudent and
none in the exercise of ordinary care would maintain the
and instruct, then the railroad company should be found
not guilty. The objection seems to be in the use of the
word "ordinary", and it is argued that the question for
the jury was not the standard of the fact but the
evidence in which it was established. To make this position
is to really require the jury to find a fact of

jection to this instruction is that it told the jury that the railroad company was not guilty of negligence in permitting the floor to be in the condition shown by the evidence, if such was the ordinary condition in which prudent persons conducting a similar freight house would in the exercise of ordinary care maintain it. Plaintiff's second instruction told the jury that it was the duty of the railroad company to use reasonable care to keep and maintain its floor in a reasonably safe condition, and a similar instruction was given on behalf of the defendant. We think it clear that the jury fully understood what the duty of the railroad company was with reference to the maintenance of the proper floor. We have considered the other objections urged to this instruction but think they are not of a substantial nature.

The fifth instruction told the jury that if they believed from the evidence that the floor was in such condition that by the use of ordinary care the paper roll in question would have been safely trucked over it, then the railroad company was not guilty. We think this instruction did not state the law correctly, but upon a consideration of all the instructions and the evidence, the facts in the case being simple and easily understood, we think that the giving of this instruction was not reversible error. Counsel concedes that instruction No. 7 is substantially the same as instruction No. 5. What we have said therefore in regard to the latter instruction disposes of this one.

The sixth instruction set up the substance of the first count of the declaration and told the jury that

testimony to this instruction is that it said the jury that
the railroad company was not guilty of negligence in not
warning the driver to be in the position where he was
because, it said, was the ordinary condition of the road
persons conducting a similar business would be in the
choice of ordinary care business is. It said it is
construed that the fact that it was the duty of the
road company to be reasonably safe in that and that
the fact is a necessary part of the instruction.
Instruction was given on behalf of the defendant. We think
it clear that the jury fully understood what the duty of
the railroad company was and that it was the duty of the
of the driver. It was explained that the fact that
there was no instruction that the fact that the fact
a prejudicial error.

The first instruction said the jury that if
they believed from the evidence that the fact was in
each condition that by the use of ordinary care the road
well in question would have been safely warned over it,
then the railroad company was not guilty. We think this
instruction did not state the law correctly, but upon a
consideration of all the instructions and the evidence,
the fact in the case being highly and really understood,
we think that the giving of this instruction was not
prejudicial error. It was a necessary part of the
is substantially the same as instruction No. 2. That we
may add therefore in regard to the first instruction
that it was not.

The second instruction was on the question of
the fact that the fact that the fact that the fact

plaintiff must prove such charge there made by a preponderance of the evidence to recover under that count. The objection to this instruction seems to be that the declaration averred that defendant "permitted divers holes and openings to be and remain" in the floor, but the proof of one hole if it contributed to the injury was sufficient. The contention is clearly without merit.

Complaint is made of instructions Nos. 2 and 12, in that they overlooked plaintiff's contention that the accident occurred by reason of the combined negligence of the two defendants. What we have heretofore said disposes of this contention.

Instruction No. 3 told the jury that plaintiff to recover must establish her case by a preponderance of the evidence; that if the evidence was evenly balanced or if the jury were in doubt or unable to say on which side the preponderance of the evidence lay, or if the preponderance was against the plaintiff, the verdict should be not guilty. It is complained that this instruction does not restrict the evidence "to the issues essential to the maintenance of the action, nor point out the issues necessary to be established by a preponderance of the evidence to entitle the plaintiff to recover." We think this instruction was not at all misleading, and is in substance the same as plaintiff's instruction No. 1. The jury were specifically told that all of the instructions constituted one connected whole or series and should be so regarded and treated, -- that they should apply them to the facts and not detach or separate one instruction

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The fact that the defendant was not present at the trial is a matter of public knowledge. The fact that the defendant was not present at the trial is a matter of public knowledge. The fact that the defendant was not present at the trial is a matter of public knowledge.

from any of the others. We have carefully considered the pleadings, evidence and instructions. As stated, the facts were not at all complicated, but were easily understood by the jury, and while the instructions are not free from error, yet we think none of the errors complained of warrant a reversal of the judgment.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

from any of the other. It may be that the
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HOTEL SHERMAN COMPANY,
(a corporation)

210 I.A. 191

Appellant,) APPEAL FROM

vs.)

CIRCUIT COURT,

COCK COUNTY.

RAILWAY TERMINAL & WAREHOUSE
COMPANY (a corporation)

Appellee.)

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

The Hotel Sherman Company brought an action on
the case against the Railway Terminal Warehouse Company
to recover damages on the ground that defendant had been
negligent in the storage of potatoes owned by plaintiff.
The jury returned a special finding that plaintiff could
not have avoided the loss complained of by the exercise
of ordinary care and a general verdict finding the defend-
ant not guilty. Judgment was entered on the verdict, to
reverse which plaintiff prosecutes this appeal.

The record discloses that a partnership con-
sisting of Morrill and Cohen were dealing in potatoes
at Twin Falls, Idaho; that they shipped potatoes to
Cohen & Company at Chicago; that beginning in October,
1913, and continuing for the season, Cohen & Company
stored with the defendant about forty cars of potatoes.
Shortly after the storage of the first potatoes a number
of cars were sold to plaintiff, and during December the
potatoes began to sprout. The potatoes were in bags
and some of them were stacked four bags high and others

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10. *Alfred Russel Wallace* (1825-1913) was a naturalist and geographer who developed the theory of evolution independently of Darwin.

SECRET

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Verfahren zur Gewinnberechnung

THE UNIVERSITY OF CHICAGO

Approved by the Board of Directors on 11/11/2010

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1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

3. Technical assistance from the Government of India was given to

REPORT OF THE BOARD OF DIRECTORS OF THE

eight or nine bags high. During the winter the sprouts were broken off, and the potatoes sorted and some of them rebagged in an endeavor to save them. Most, if not all, of this work was done by Cohen & Company. Many of the potatoes, however, were spoiled. Plaintiff's position was that the loss was occasioned by poor ventilation and other bad storage conditions.

Plaintiff contends that the court erred in giving to the jury instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 10, submitted on behalf of the defendant, and in the admission of certain documentary evidence.

Instruction No. 1 told the jury that under the law plaintiff was required to prove by a preponderance of the evidence the issues essential to the maintenance of plaintiff's action, and if plaintiff had not done so, the verdict should be for the defendant. It is argued that the court should have pointed out the essential allegations and that in other instructions given on behalf of the defendant, the issues were incorrectly stated. In Harvey v. C. & A. Ry. Co., 221 Ill. 242, an instruction substantially the same as the one here complained of was held to be not reversible error, where there were no instructions given pointing out the material allegations of the declaration. Counsel has failed to point out where other instructions given by defendant incorrectly stated the issues.

Complaint is made of the second instruction for the reason that it told the jury that plaintiff was required to establish by a preponderance of the evidence the negligence of the defendant, which was a greater

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NEW YORK, N. Y. 10017

burden on the plaintiff than the law requires. While this instruction is not accurate, we think plaintiff cannot complain as the jury were told by an instruction submitted by plaintiff that it was required to establish its case by a preponderance of the evidence.

It is said that instruction No. 3 is erroneous, because it told the jury that the defendant was required to exercise that degree of care which ordinarily prudent warehouse men are accustomed to exercise in regard to similar goods, in like circumstances, while the statute requires such warehouse men to exercise the same degree of care as the owner of similar goods would exercise under like circumstances. In three of the instructions submitted on behalf of plaintiff the jury were told that the law required a warehouse man to exercise that degree of care which an ordinary, reasonable and prudent man would exercise with his own goods under similar circumstances. We think it clear therefore that the jury were properly informed as to the degree of care required of the defendant.

It is urged that instruction No. 4 was erroneous for the reason that it took from the jury the question whether the defendant's negligence caused the decay of the potatoes by reason of dry rot, and that it was also erroneous because it singled out one defense. In support of this contention it is argued that the evidence as to what caused the dry rot was conflicting. The witness Radke for the plaintiff testified that when the potato has dry rot it decays and in doing so the water evaporates and a certain property of starch would be left; that this

burden on the plaintiff when the law requires. While this
investigation is in progress, we think plaintiff cannot com-
plain as the law was said by the witnesses submitted by
plaintiff that it was required to establish the case by a pre-
ponderance of the evidence.

It is said that instruction No. 3 is erroneous.
Because it said the jury that the defendant was required
to establish that degree of care which ordinarily prudent
persons use and no testimony is required in regard to the
fact of negligence, while the statute in
this case requires that the defendant be found guilty of
negligence and that the plaintiff be found guilty of contributory
negligence. In these circumstances, it is said that the
plaintiff is required to establish the fact that the
defendant was negligent and to establish the degree of
care which an ordinary, reasonable and prudent person
would use under the same facts and circumstances.
We think it clear therefore that the law was properly
stated as in the degree of care required of the defend-
ant.

It is argued that instruction No. 4 was erroneous
for the reason that it took from the jury the question
whether the defendant's negligence caused the injury of
the plaintiff by reason of any act, and that it was also
erroneous because it stated that the evidence as to
of this negligence it is argued that the evidence as to
that caused the act was conflicting. The witness
testified that the plaintiff testified that when the person
was not in danger and is doing so the water evaporates

sort of dry rot is produced by improper ventilation and improper storage. The witness Morrill testified for the plaintiff that there is a condition known as dry rot which results from bruises or storage or ventilation conditions; that excessive heat will make the potatoes dry where bruised and cause dry rot. This witness further testified that he had seen very little of the disease of dry rot, but had seen what is technically called dry rot in the trade; that there is more than one kind of dry rot; that one is a disease and the other results from bruises or improper handling; that the disease of dry rot is a field disease. For the defendant McDonald and Webb testified that the disease of dry rot attacks the potatoes when they are growing. The instruction told the jury that, if the loss to the potatoes was caused solely by the disease known as dry rot, plaintiff could not recover and if the jury found from the evidence that the damage was caused both by the disease and by the negligence of the defendant, then plaintiff could not recover unless it proved the amount of damages caused by the negligence. The theory of plaintiff's case was that the potatoes when received at the warehouse were in good condition, and free from disease; that the defendant by failing to properly ventilate the warehouse by opening the windows, and by improperly storing them, the potatoes were spoiled and the loss incurred. On the other hand the defendant's theory was that when the potatoes were placed in the warehouse they were "heated", some of them "frosted" and affected by the disease of dry rot; that the warehouse was not what is known as a cold storage warehouse, where the temperature could be artificially reduced, but that the only means of lowering the temperature was by opening the

work of day and night by means of mechanical ventilation and
 known sources. The witness further testified that the
 difficulty that there is a connection between the two which
 results from business as a source of ventilation conditions;
 that mechanical work will make the business very much worse
 and cause day work. This witness further testified that he
 had seen very little of the disease at any time, but had seen
 that it is technically called day and night; that there
 is more than one kind of day and night; that one is a disease
 and the other results from business as a source of ventilation;
 that the disease is day and night is a technical term, but the
 technical term is day and night (which is the disease). The
 day and night are related when they are working. The
 technical term is day and night, but the day and night are related
 was caused solely by the disease known as day and night, difficulty
 could not recover and it was very common from the witness
 that the disease was caused both by the disease and by the
 negligence of the patient, then difficulty could not be
 recovered unless it proved the source of damage caused by the
 negligence. The theory of difficulty's cause was that the
 disease was related to the negligence and it was not a good one
 illness, and that from disease; that the testimony of this
 was as properly verified the negligence by opening the
 window, and by improperly stating that the disease was
 verified and the loss incurred. On the other hand the
 testimony of this witness was that the disease was caused
 in the window and was "caused", some of them "caused"
 and affected by the disease of day and night; that the negligence
 was not what is known as a single source window, where the
 negligence would be technically caused, but that the

windows for ventilation purposes whenever the weather would permit; that the winter was soft and mild with a great deal of dampness in the atmosphere, and that the damages to the potatoes were due to the condition in which the potatoes were in when received and the atmospheric conditions. In other instructions the jury were told that the defendant would be liable for any damages occasioned by its negligence, and as the evidence shows that the disease known as dry rot was a field disease, and as the instruction stated that the defendant was not liable for damages caused solely by this disease, we think it does not constitute reversible error. The contention that the instruction singles out one defense is untenable, for the reason that the defendant was entitled to submit instructions on its theory of the case, and in any event we do not believe it was misleading.

Three objections are urged to instruction No. 5, (1) that the jury were told that if plaintiff knew of the storage conditions and that the continuation of such conditions would injure the potatoes, then no recovery could be had; (2) that it is mandatory and as it leaves out the element of time it, therefore, does not contain all the elements necessary to support a verdict for the defendant, and (3) that it omits from the consideration of the jury defendant's promise to remedy the conditions complained of. It is argued that the instruction did not state any time when such notice was given to the defendant, and that under it plaintiff could not recover even if it obtained the knowledge after the damage was done. As there was no dispute in the evidence as to when the defendant acquired the

knowledge, then the failure to mention this element in the instruction was immaterial. The evidence shows that the notice was given to Cohen & Company, and it is strenuously insisted throughout plaintiff's brief that this evidence was incompetent, for the reason that there was no evidence that Cohen & Company were the agents of plaintiff. We think it so clearly appears from the evidence that Cohen & Company were the agents of plaintiff that it is unnecessary to refer to the evidence in this regard. What we have said also disposes of the second point. The third objection is that it took from the jury's consideration the question whether defendant promised to remedy the storage conditions after complaint by the plaintiff. The conclusion from this is that as there was evidence tending to show that upon complaint by plaintiff as to the storage conditions, the defendant agreed to remedy them, and therefore plaintiff was guilty of no negligence in taking no further steps towards the preservation of the potatoes. There might be force in this contention if it were not for the fact that the jury found by its special verdict that the plaintiff was guilty of no negligence, so it is apparent that plaintiff was in no way prejudiced.

It is argued that instruction No. 6 was wrong, because it told the jury that negligence will not be presumed from loss while the goods are in the hands of the bailee, for the reason that the law is otherwise. As a general rule, where goods are delivered in good condition and afterwards returned in a damaged condition, the presumption of law is that the bailee is guilty of negligence. Funkhouser v.

Wagner, 62 Ill. 59; Bennet v. O'Brien, 37 Ill. 250.

But there is an exception to this rule, where the goods bailed would be deteriorated or perish from inherent defects, or natural causes. 40 Cyc. 472; Patterson v. Wenhatches Canning Co., 101 Pac. (Wash), 721. The instruction therefore in this regard was not erroneous. A second complaint to the instruction is that it required plaintiff to prove the damages caused by defendant's negligence by a fair preponderance of the evidence; that this puts upon plaintiff a greater burden than the law requires; that a preponderance of the evidence is sufficient. While the instruction is not accurate, we think the jury were clearly instructed in several other instructions that plaintiff was required to prove its case only by a preponderance of the evidence.

Instruction No. 7 told the jury if they found from the evidence that plaintiff after it learned the potatoes were decaying took no steps to protect itself from further loss, the defendant would not be liable for any damages accruing after such notice. It is said that it assumes that it was possible for plaintiff to protect itself from further loss by taking some step after notice, although the potatoes might have been spoiled at the time and that further loss could not have been prevented no matter how diligent plaintiff was. We think this error was rendered harmless by the special verdict.

Instruction No. 8 is said to be erroneous for the reason that it told the jury that if they found from the evidence that the potatoes were infected with the

disease known as dry rot or any other disease before they were put in the warehouse and that the damage was occasioned solely by such infection, then defendant was not liable; that this instruction singles out one issue, and that there is no evidence that the potatoes had dry rot or any other disease at the time they were put in the warehouse. We think there was evidence that tended to show that the potatoes were affected with dry rot at time of storage, and that they were heated and some frosted when put into the warehouse, and therefore the instruction is not subject to the objection urged.

The objection to instruction No. 10 is that it told the jury that the defendant was not liable for damages caused by dry rot or any other cause, unless such damages could be avoided by the exercise of ordinary care and diligence by the defendant. It is said that the words, "or any other cause" would include defendant's negligence, and that manifestly plaintiff was entitled to recover for any damages caused by defendant's negligence. The contention is unsound, for the reason that the first paragraph expressly told the jury that the defendant was not liable for any damages to the potatoes unless such damages were caused by the negligence of the defendant.

Over the objection of plaintiff defendant was permitted to introduce in evidence a letter and memorandum written by defendant to Cohen & Company in reference to potatoes stored by them in defendant's warehouse. Plaintiff claims this was error, for the reason that the documents offered were not written to plaintiff and

that plaintiff was in no way connected with them as there was no presumption that Cohen & Company was its agent, and further that the potatoes in question were not referred to in the documents. When these documents were offered counsel for defendant asked counsel for plaintiff for the original. No answer was made. The letter purported to confirm a conversation had by Gavin of Cohen & Company and a representative of the defendant with reference to the storage of some of the potatoes in question. A witness for the defendant testified that it was a correct copy, as did the witness Gavin who was at the time of the communication in the employ of Cohen & Company. No complaint is made that it was not a true copy, and while the memorandum attached refers to some potatoes not involved in this controversy, it does refer to at least one car load of the potatoes. The objection was to exclude the entire document, and in these circumstances, we think it was properly overruled. Moreover plaintiff in its case in chief offered evidence of the quality of about 300 cars of potatoes shipped that season from Idaho, which included the ones in question, and for this reason also the evidence was proper.

Plaintiff objects to the admission in evidence of certain stock cards, on which memoranda were written showing that a great many of the cars received at the warehouse billed to Cohen & Co., shipped from Idaho, were in bad condition when received. It is said that as the potatoes mentioned on these stock cards did not involve any of plaintiff's potatoes, the error was most prejudicial. Witnesses on behalf of plaintiff had testified

that all the potatoes shipped by Merrill & Cohen from Idaho were in first class condition. This of course included plaintiff's potatoes. As tending to show that this was not the fact, the cards were offered, and we think they were clearly competent.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

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J. E. HOUSTON,

Appellee,

2101.A.195

vs.

C. G. FRANK,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

J. E. Houston brought suit against C. F. Frank to recover \$5,000. There was a verdict and judgment in plaintiff's favor for the amount of his claim, to reverse which defendant prosecutes this appeal.

Plaintiff testified that the defendant was engaged in selling real estate bonds and mortgages, secured by property located in Cook County; that plaintiff had from time to time purchased bonds from defendant; that in December, 1913, or January, 1914, he went to defendant's place of business to purchase some more bonds but was prevailed upon to purchase certain stocks; that at various times thereafter covering a period of about two years, he made other purchases of stock until he had invested \$9,500; that he had objected on several of these occasions stating that he wanted bonds and not stock, but each time was persuaded by the defendant or his representative to take stock; at the several times he purchased stock defendant agreed that if at any time plaintiff was dissatisfied with the stock he could surrender it and receive bonds in lieu thereof or the return of his money;

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that shortly before the beginning of this suit plaintiff went to defendant's place of business and demanded bonds or his money in lieu of the stock, but that the defendant refused; that plaintiff made several demands of this nature and finally, September 18, 1916, a written agreement was entered into whereby plaintiff turned back to defendant \$4,500 worth of the stock and received in lieu thereof an equal amount of bonds. After reciting this, the agreement provides:

"I hereby state that you made this exchange absolutely at my recommendation and suggestion and without any compulsion on my part;-- that the 50 shares of preferred stock of said Security Realization Co., which I still own, I am perfectly satisfied with-- that I hold this stock until all of the present issue of preferred stock of the Security Realization Co. has been disposed of by the Company and after all of said stock has been disposed of by the Security Realization Co., I may then ask you to offer my stock for sale to your regular clients. However, it is agreed that you are not to be held responsible for the disposition of this stock, nor do you agree to guarantee to me to dispose of this stock at any time for me. It is my absolute stock, and if I desire to dispose of it, it will be up to me to find my own purchaser for same.

"Any agreements that you and I may have had subsequent to this date with regard to the exchange of this stock are hereby considered null and void."

Plaintiff further testified that he read this agreement, understood it and signed it, but that it was agreed at that time that plaintiff was to retain the fifty shares, or \$5,000 worth of stock, until the first or second dividend should thereafter become due.

The witness Pierce, who had formerly been in the employ of the defendant, testified on behalf of the plaintiff that it was agreed at the times plaintiff pur-

that money before the beginning of this year. Plaintiff
went to defendant's place of business and showed books
on his money in lieu of the check, but that the defendant
refused; that plaintiff was several months of this year
was not paid, defendant in 1911, a written agreement
was entered into whereby plaintiff should have a check
and \$2,500 worth of the stock and received in lieu of the
of an equal amount of bonds. After receiving this, the
agreement provided:

"I really agree that you made that exchange
absolutely as my recommendation and suggestion
and without any compromise on my part;-- that the
90 shares of preferred stock of said
Kendallville Co., which I still own, I am perfectly
satisfied with-- that I hold this stock worth
all of the present issue of preferred stock of
the Kendallville Co. and have disposed of
the Company and after all of said stock has
been disposed of by the Kendallville Co.,
I may then make an offer my stock for sale to
you or other parties. However, it is agreed that
you and not I be held responsible for the dis-
position of this stock, and be free to agree to there-
after to be disposed of this stock at any time
for me. It is my absolute stock, and if I desire
to dispose of it, it will be up to me to find my
own purchaser for same."
"Any agreement that you and I may have had
concerning this sale with regard to the ex-
change of this stock has hereby terminated and
is void."

[illegible]

10-11-1944

chased the stock that if at any time he should become dissatisfied he could return his stock to defendant and receive bonds or his money back in lieu thereof. The evidence further shows that Pierce some time prior to the beginning of the suit was in business with another concern and the evidence tends to show he or the company with which he was associated was paying the costs of this litigation. Plaintiff himself testified that he was not paying any such expenses, and he has filed no appearance in this court.

Defendant testified that at the times of the purchases of the stock there was no agreement that the stock could be returned for bonds or money, but afterwards when plaintiff complained that he wanted the bonds in lieu of the stock, he told plaintiff that if at any time he (defendant) felt the stock was going to be lost, he would give plaintiff bonds for it. He further testified that at the time the written agreement was entered into, September 13, 1916, the agreement embodied the entire matter and there was nothing said that plaintiff was to retain the stock only until the first or second dividend would be paid. In this respect defendant was corroborated by two other witnesses. No complaint is made that the stock was not worth what plaintiff paid for it. The stock was not tendered back during the trial, but after the verdict, when the motion for a new trial was being argued it was tendered in open court, but not accepted by defendant. At the close of the evidence the defendant moved the court for a peremptory in-

...the stock was at any time in the hands of the
 defendant he would return the stock to the
 and receive credit for the same in the
 ...the defendant ... the stock was at any time in the hands of the
 to the defendant of the stock was at any time in the hands of the
 other person and the defendant ... the stock was at any time in the hands of the
 company with which he was associated and paying the
 costs of this litigation. The defendant himself testified
 that he was not paying any of the expenses, and he has
 filed no appearance in this case.

...the defendant testified that at the time of the
 purchase of the stock he was in agreement that the
 stock would be returned for cash or money, but after
 some time the defendant ... the stock was at any time in the hands of the
 in fact at the time, he said himself that it was not
 time he (defendant) felt the stock was going to be lost,
 he ... the defendant ... the stock was at any time in the hands of the
 filed that at the time the witness appeared and advised
 him, defendant ... the stock was at any time in the hands of the
 and after and there was nothing said that defendant
 was to retain the stock only as if the stock of record
 divided would be paid. In this respect defendant was
 corroborated by two other witnesses. He testified in
 said that the stock was not worth what defendant said
 for it. The stock was not returned back during the
 trial, but after the verdict, when the matter for a
 new trial was argued it was returned in open court,
 but not received by defendant. At the close of the trial
 hence the defendant moved the court for a judgment in

struction. The motion was overruled. In this we think the court erred. After a careful consideration of all the evidence, and in view of the fact that plaintiff testified that he read and understood the agreement and made no explanation as to why it did not contain the provision that he was only to keep the \$5,000 worth of stock for a certain period or time, we think in these circumstances the written document was a settlement of all the matters between the parties. It therefore follows that the judgment of the Municipal Court must be reversed.

JUDGMENT REVERSED.

situation. The office was overworked. It was no longer
 the same. After a certain period of time
 the situation, and in view of the fact that the
 situation had been overworked and the situation was
 made no longer the same. It was no longer the
 provision that he was only to keep the \$3,000 worth of
 stock for a certain period of time, we think in these
 circumstances the written document was a settlement
 of all the matters between the parties. It therefore
 follows that the judgment of the District Court must
 be affirmed.

The Court is of the opinion

247 - 23592

R. A. VEACH,

Appellant,

vs.

ALLEN AUTOMOBILE CO.,
a corporation,

Appellee.

210 I.A. 199
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

R. A. Veach brought suit against the Allen
Automobile Co. to recover \$150. The case was tried
before the court without a jury; there was a finding
and judgment in favor of the defendant, to reverse
which plaintiff prosecutes this appeal.

The record discloses that on September 24,
1915, plaintiff and defendant entered into a written
contract, whereby plaintiff was to sell automobiles
for a period expiring July 31, 1916. The contract
recited that plaintiff had deposited \$150 with defend-
ant which sum it expressly stated was not to apply on
the purchase of cars, but was to be retained by defend-
ant and returned to plaintiff on the cancellation or
termination of the contract, provided a full and com-
plete settlement of all accounts was made. The con-
tract gave the list price of automobiles as \$795, but
the net price was left blank. Plaintiff agreed to take

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one car during the month of October, which he did, paying therefor \$675.75, or fifteen per cent less than the list price. Plaintiff endeavored to sell other cars but was unable to do so, and at the expiration of the time covered by the contract demanded the return of his \$150, which was refused. Defendant in its affidavit of merits sets up that the money was deposited to insure the faithful performance of the contract by plaintiff; that plaintiff failed and neglected in every particular to perform the conditions of the contract, and therefore the deposit was forfeited.

Defendant contends that the price specified in the contract is \$795; that there is no provision for a discount where only one car is purchased; that there was a balance due and owing from plaintiff for accessories, and under the terms of the contract the \$150 nor any part of it was to be returned until there was a full and complete settlement of all accounts; that it clearly appears that there was still \$119.25 due on the purchase price of the automobile and also some items for accessories, the amount of which is not stated, and therefore plaintiff was not entitled to maintain this suit.

The contract does not state the net price to be paid for automobiles by dealers. But, the defendant in its letter of November 28th, states that the discount allowed dealers is fifteen per cent off the list price, and that this is the amount that had been allowed plaintiff. From a consideration of all the evidence, we think it clear that when the car was sold to plaintiff he was allowed fifteen per cent from the list price, and that

one day during the month of October, which he did, pay-
ing therefor \$278.75, or fifteen per cent less than the
list price. Plaintiff understood he was about to pay but
was unable to do so, and of the expiration of the time
covered by the contract demanded the return of his \$150,
which was refused. Defendant in his affidavit of defense
sets up that the money was delivered to him and that
the performance of the contract by plaintiff; that again-
st the fact and negates in every particular the position
the defendant of the contract, and therefore the contract
was forfeited.

Defendant contends that the price specified in
the contract is \$750; that there is no provision for a
discount where only one car is purchased; that there was
a balance due and owing from plaintiff for a previous
and under the terms of the contract the \$150 was not paid
of it was to be retained until there was a full and com-
plete settlement of all accounts; that it clearly appears
that there was still \$150 due to the defendant at the
the automobile and also some items for accessories, the
amount of which is not stated, and therefore plaintiff
was not entitled to maintain this suit.

The contract does not state the net price to
be paid for accessories by plaintiff. Now, the defendant
in its motion of November 22nd, stated that the discount
allowed plaintiff is fifteen per cent off the list price,
and that this is the amount that has been allowed plaintiff.
Now, from a consideration of all the evidence, we think
it clear that when the car was sold to plaintiff he was
allowed fifteen per cent from the list price, and that

this price could not thereafter be changed by the defendant. A witness for the defendant testified that there was some balance due and owing from the plaintiff to the defendant on account of accessories. A witness for the plaintiff, however, testified that when the matter of settlement came up nothing was said about any balance of this nature, but the only question was the fifteen per cent discount, and in the letters which were received in evidence no mention is made of any such items. If there was any sum due defendant for accessories, the defendant should have introduced evidence of this fact and the amount thereof, and not having done so, there was no evidence that would warrant any finding that there was any sum due from plaintiff to defendant. We think a fair construction of the contract is that the deposit was made to insure any balance that might be due the defendant and that defendant could deduct any such balance from the deposit. There is no mention in the contract that the deposit is to be forfeited as contended by defendant in its affidavit of merits. The law does not favor forfeitures. As there is no evidence that plaintiff was indebted to defendant in any sum, he was entitled to recover the \$150. The judgment of the Municipal Court of Chicago is therefore reversed and judgment will be entered in this court against the defendant and in favor of plaintiff for \$150.

JUDGMENT REVERSED AND JUDGMENT HERE.

382 - 21779

JOHN O'DONNELL and N. CARWELL,
co-partners, etc.,

Defendants in Error,

vs.

O. P. CURRAN,

Plaintiff in Error.

210 1.A. 200

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of
the court.

This was an action of the fourth class in the
Municipal Court of Chicago in which the defendants in
error recovered a judgment in debt for the sum of \$300.00,
the court assessing plaintiff's damages at the sum of \$142.50
and costs, and ordering that, upon the payment of said dam-
ages and costs with interest thereon, the debt be discharged.
The original statement of claim recited that the plaintiff's
claim was for damages on a bond thereto annexed. The bond
was a stay-of-execution bond, in the usual form, executed
by William J. Turnes as principal and O. P. Curran, Jr. as
surety. The statement of claim proceeded to say that the
writ of error and all the proceedings under said bond were
duly dismissed by the Appellate Court for want of prosecution
and that the claims arising therefrom were unsatisfied.
Later the defendant herein filed his appearance, also an
affidavit of merits. It appears from the record that, on
motion of the plaintiffs, this affidavit of merits was
stricken from the files August 6, 1915, and the defendant
was ordered to file an amended affidavit of merits within
five days. Such amended affidavit was filed by the defend-

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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and that the above stated information was not furnished to the Bureau.

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ant August 9, 1915. On August 16, 1915, by leave of court, the plaintiffs filed an amended statement of claim which was similar to the original statement with two exceptions; first, there was not attached to it a copy of the bond on which the suit was based, and, second, the affidavit of claim contained a statement of the items going to make up the plaintiffs' claim. On August 17, 1915, on motion of the defendant, the court ordered that "the affidavit of merits heretofore filed herein stand as affidavit of merits to plaintiffs' amended statement of claim." Thereupon, on motion of the plaintiffs, the court struck the defendant's affidavit of merits from the files. No affidavit of merits other than those above referred to was filed and no order involving an affidavit of merits was entered by the court after the filing of the amended statement of claim other than the order above referred to. If the record before us, reciting the orders of August 17, is a correct transcript of those orders, they amounted to nothing because "the affidavit of merits" to which the orders refer, had already been stricken from the files and was no longer in the case, in which event the defendant was in default for want of an affidavit of merits directed to the amended statement of claim. We presume, however, that the orders of August 17 refer to the amended affidavit of merits and that the effect of those orders was to provide that the amended affidavit of merits which had been filed previous to the filing of the amended statement of claim might stand as the affidavit of merits to that amended statement of claim and that, as such, it be stricken from the files on motion duly made by the plaintiff. The defendant electing to stand by the amended affidavit of merits, the court proceeded to enter

judgment for the plaintiff.

The defendant alleges that the judgment of the trial court should be reversed for the reason that the court erred in entering the order of August 6, 1915, striking the affidavit of merits from the files. Whatever right the defendant had to question that ruling of the court was waived by the filing of the amended affidavit of merits. McKichan v. Follett, 87 Ill. 103; Stover Mfg. Co. v. Millane, 89 Ill. App. 532, 537; Caveny v. Weiller, 90 Ill. 158; Wittman Co. v. Goeke, 200 Ill. App. 108.

Defendant further alleges that the trial court erred in striking the amended affidavit of merits from the files. AS to this question, the record preserves nothing upon which this court can pass, for the ruling of the court striking a pleading from the files cannot be reviewed in a court of appeal unless the pleading and the ruling are preserved in a bill of exceptions, and there is no bill of exceptions in this record. A pleading which has been stricken from the files is no longer a part of the common law record and can only be brought to the attention of this court by a bill of exceptions. Motions and orders striking pleadings from the files should be preserved by bills of exceptions and cannot be made part of the record otherwise. Barger v. Hobbs, 67 Ill. 592; Mann v. Brown, 263 Ill. 394; Wittman & Co. v. Goeke, *supra*; Harris, et al vs. Willis, Appellate Court, First Dist. #23203, filed Jan. 30, 1918; Harmon v. Callahan, Ill. App. Ct., First Dist. #22404, filed Nov. 30, 1917; American Lumber Co. v. Leach, Ill. App. Ct. First Dist., #22152, filed June 27, 1917.

Y. Hoshino, 60117, 1983; Y. Hoshino, 60117, 1983.

SECRET

Defendant urges the further point that the trial court erred in entering the judgment because of the insufficiency of the amended statement of claim. This was a suit of the fourth class in the Municipal Court where no formal written pleadings are required, and, in such a case, such a statement of claim as is involved here, though technically defective, which advises the defendant of the plaintiff's demand, as required by section 40 of the Municipal Court Act, is sufficient when questioned for the first time in the court of review. Gamble-Robinson Commn. Co. v. Union Pacific Rd. Co., 130 Ill. App. 256, 268.

For the reasons stated, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

DR. D. A. K. STEELE,

Appellee,

vs.

THOMAS E. LEYHAN,

Appellant.

210 I.A. 201

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is a suit which was brought by Dr. Steele against Thomas E. Leyhan for medical services rendered by the plaintiff to Mrs. Leyhan in February and March, 1915. After the case was instituted, Mrs. Leyhan was added as a party defendant. The plaintiff recovered a judgment in the trial court for \$273.00 against both defendants and Thomas E. Leyhan alone has appealed. He urges that the judgment of the trial court should be reversed, as to him, by reason of the fact that at and before the time at which the plaintiff rendered the services in question, Mrs. Leyhan was living separate and apart from him without his fault and that he in no way requested or authorized the rendering of the services. The record shows that this was the case and that, some time before the services were rendered, Mrs. Leyhan had instituted an action for separate maintenance against her husband in which an order had been entered directing Mr. Leyhan to pay his wife, as alimony pendente lite, the sum of \$7.00 a week, with which order he complied at all times. The record further shows that the separate maintenance proceedings were dismissed

102 A.1048

AMOUNT OF \$ 100.00

Application

JOHN J. LEE

VS.

JOHN J. LEE

JOHN J. LEE

JOHN J. LEE, Plaintiff, vs. JOHN J. LEE, Defendant.

the court.

This is a case and is being heard by Mr. Judge
against Thomas E. Lanyon for medical services rendered by
the plaintiff in 1941. Lanyon is a married man, 1941.
After the case was instituted, Mr. Lanyon was asked to
a party defendant. The plaintiff rendered a judgment
in the trial court for \$100.00 against both defendants
and Thomas E. Lanyon. Lanyon is a married man, 1941.
The judgment of the trial court was affirmed, and he
him, by reason of the fact that at and before the time
at which the plaintiff rendered the services in question,
Mrs. Lanyon was living separate and apart from him with
his best friend and that he is now requested to reimburse
the plaintiff of the services. The record shows that this
was the case and that, some time before the services were
rendered, Mr. Lanyon had instituted an action for separa-
tion maintenance against her husband in which an order
had been entered dissolving the marriage in 1941, and
allowing maintenance to her. The sum of \$100.00 a week, - the sum
which he was paid at all times. The record further shows
that the plaintiff's services were necessary.

for want of equity, March 31, 1915.

As the plaintiff has made this an action against the husband and wife jointly, he must recover, if at all, under the provisions of Section 15, Chapter 68, of the Illinois Statutes which provides as follows: "The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or either of them, in favor of creditors therefor; and, in relation thereto, they may be sued jointly or separately." As a condition precedent to any "expenses of the family", there must be a family, - a family in fact, without regard to what knowledge the plaintiff had of the fact. Schlesinger & Mayer v. Keifer, 30 Ill. App. 253; Featherstone v. Chapin, 93 Ill. App. 223. If there has been an actual separation of husband and wife, - such a separation as the law recognizes, the family which was constituted by their marriage no longer exists. Hudson v. King Brothers, 23 Ill. App. 118. It is the contention of the plaintiff that these cases are overruled by the later case of Arnold v. Keil, 81 Ill. App. 237, but that case is not in point for there articles were sold to the wife on the credit of herself and husband at a time when they were living together as a family, although it seemed that the wife made the purchases in contemplation of a separation between herself and husband, which separation actually did take place about ten days later. The court held that, under the facts in that case, the husband was liable; but that case does not touch the question involved under the facts as proven in this case.

Where husband and wife are living separate and

THE CITY OF NEW YORK, County of New York.

IN SENATE, January 11, 1907.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE.

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apart, it devolves upon the person giving the credit to show that the husband is liable. It is for all persons knowing that the parties live separate to know whether the wife had cause to separate from her husband. Ree v. Berke, 25 Ill. 414. For necessities furnished under such circumstances, the burden is upon the plaintiff to show that the wife was not at fault, or that the husband authorized or assented to the performance of the services in question. Bonney v. Perham, 102 Ill. App. 634.

The plaintiff here has failed to show that the wife was living separate and apart from her husband without her fault. In fact, such evidence as the record contains on this point is to the contrary. The plaintiff testified that, at the time the services were performed, he was ignorant of the fact that Mrs. Leyhan was living separate and apart from her husband, but, under all the circumstances disclosed by the record, we feel that the plaintiff was chargeable with notice of that fact. He was called in to treat Mrs. Leyhan by her mother and sister. He found her in a very serious condition and performed a major operation upon her twenty days after being called to treat her. It would be inevitable that a doctor would confer with his patient's husband under such circumstances, where she and her husband were living together, and we cannot doubt the doctor knew the true relationship existing between Mr. and Mrs. Leyhan at that time.

Where a husband and wife are living separate and apart, and there is a divorce suit pending in which there is an order for alimony pendente lite, and the husband is not in default on that order, he is not liable for necessities

subsequently furnished during the pendency of the suit. The plaintiff testified, as to this litigation, that he knew nothing about it. Under the circumstances to which we have referred, he is put upon inquiry. He further urges that the \$7.00 a week allowed as alimony pendente lite in the separate maintenance proceedings was never intended to cover services such as he rendered. That very point arose in the case of Mare v. Gibson, 32 Ohio State Reports, 33, where the court pointed out that it had been urged that "the alimony allowed to the wife proved to be inadequate by reason of her subsequent ill-health, which was not anticipated when the amount was fixed by the court. This change in her circumstances would no doubt have justified her in applying to the court * * * for an increase of the sum allowed. But, if she remained satisfied with the amount decreed, others have no right to complain. The exercise of the judicial discretion which she had herself invoked, can not be collaterally impeached or drawn in question, especially by a stranger to the controversy."

For the reasons indicated, the trial court erred in finding the issues in favor of the plaintiff as against the appellant, and therefore the judgment of the court below will be reversed.

REVERSED.

EDWARD T. PAGE,

Appellant,

vs.

WALTON D. SUENDER,

Appellee.

210 I.A. 208

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion
of the court.

This is an action brought by the appellant in the Municipal Court of Chicago to recover \$100.00, being the balance due on a promissory note with interest. A jury was waived and the cause was submitted to the court and there was a finding and judgment for the defendant, from which the plaintiff has appealed. The evidence shows that the plaintiff is the president of the Page-Davis Company, presumably a corporation, although the latter fact is not clear from the testimony; that the company operates the Page-Davis School and that the plaintiff also acts as the superintendent of the school; and that the school conducts a correspondence course in advertising. The evidence also shows that, under date of Feb. 18, 1914, the Page-Davis School, by Edward T. Page, President and J. Frank Page, Vice President and secretary, issued and delivered a certificate to the defendant certifying to the fact that defendant had performed all the conditions of the Page-Davis Company which entitled him to a complete scholarship for the study of advertising, and that

210 I.A. 208

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he would receive instruction in all subjects embraced therein until qualified to receive a certificate of proficiency. Under the same date the defendant signed a document reading, in part, as follows: "I hereby subscribe for and acknowledge the receipt of a scholarship in the Page-Davis School, covering a correspondence course in advertising, and I promise to pay to Edward T. Page, or his order, the sum of \$110.00 in the following manner." Following this the terms of payment were set forth and following that the same document contained a recital of the terms of the agreement made between the parties relative to the instruction that was to be given the defendant.

Following this, the defendant received some of the lessons called for by the agreement, and made certain payments under his contract. A number of these payments were sent in by mail in letters addressed to Mr. Edward T. Page, in which the defendant stated, "You find enclosed" so much," as per contract, "giving the amount of his remittance. Although the plaintiff was a minor when he executed this contract, it was not disputed that he ratified the same after reaching his majority. After a time the defendant discontinued his lessons and his payments under the contract, and, from his letters, it is apparent that the reason for this was that he was out of a position and without funds. After some effort on the part of the plaintiff to induce him to resume his lessons and his payments, this suit was instituted.

Although the document executed by the defendant contained a recital of the terms of payment and certain

references to the instructions which the defendant was to receive from the Page-Davis School, on the subject of advertising, it amounted to a promissory note in which the plaintiff was made the payee and the defendant was the maker. The payment of the money was not made conditional in any way. The court found the issues for the defendant, apparently on the theory that his contract was with the Page-Davis School and that in case of a breach of the contract, the Page Davis School was the proper party plaintiff and not Edward T. Page personally. With this theory, we cannot agree. The defendant executed this note payable to the plaintiff personally, or to his order, and the consideration for that note was a correspondence course in advertising to be given the defendant by the Page-Davis School, of which the plaintiff was the superintendent. Whether or not the consideration for the execution of the instrument on which this suit is based passed to the defendant from the payee or promisee, who is the plaintiff here, or from someone else, the consideration would be sufficient to sustain the instrument. This would be true provided only there was a valuable consideration passing to the defendant from anyone, by reason of which consideration the instrument was executed by him. Moore v. Hubbard, 42 N. E. Rep. 962; Harrison v. State Bank of Monticello, 94 N. E. Rep. 1020; Carter v. Long, 28 So. Rep. 74.

Plaintiff proved that the Page-Davis School had at all times been, and still was, in a position to continue to furnish the lessons called for by the contract, and was ready and willing to do so. No reason appears in the record for the default of the defendant in the carrying out of his part of the contract other than the one already indicated.

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This being the case, the trial court erred in finding the issues for the defendant and therefore the judgment of the trial court will be reversed and judgment will be entered here for \$100.00, with interest at 5% per annum from April 21, 1917, the date of the judgment in the trial court, amounting in all to \$104.53.

REVERSED AND JUDGMENT HERE.

PEOPLE OF THE STATE OF
ILLINOIS ex rel. JAMES DUNBAR,
Appellant;

vs.

CITY OF CHICAGO et al.,
Appellees.

3751
210 I.A. 218
APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from an order sustaining a demurrer to a petition, as amended, for mandamus, to restore relator to the position of section foreman of the City of Chicago. The petition alleges facts tending to show that said position was one in the duly classified service to which he had been appointed in accordance with the provisions of the civil service law, and from which without cause or compliance with said law he had been wrongfully discharged, and for which appropriations existed, duly made by the city council. The petition is similar in form and averments to that recently passed on by the Supreme Court in People v. Coffin, 282 Ill. 599, and the general demurrer raises practically the same points argued and decided in that case, where the demurrer was held properly overruled. The main contention here, as there, is that the petition does not show the creation of an office, and that one cannot be created by an appropriation therefor. In the light of that decision the distinctions made and authorities cited by appellees respecting an office are not applicable to a mere position or place of employment duly classified as such under the civil service law and appropriated for by the city council.

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This report is from an order appointing a director
to a position, as provided, the Commission, to receive release
to the position of director, pursuant to the Act of 1939.

The position of director is held by the
Commission and is the only classified position in which he
had been appointed in accordance with the provisions of the
Civil Service Law, and from which official notice or compliance

with said Law has been specifically distinguished, and for
which appointments are made, only by the city council.

The position is similar in form and substance to that
recently created by the Supreme Court in People v. Kelly.

See Ill. 210, and the general language contained
the same points raised and decided in this case, where the
language was held properly overruled. The main contention

here, as there, is that the position does not show the
creation of an office, and that the same is created by an
appointment without. In the light of that decision the

distinctions were not authorized and the position was
created in effect and not compliance to a mere position on
place of appointment, and classified as such under the Civil
Service Law and recognized for by the city council.

We think with respect to the ordinances pleaded the petition sufficiently states their substance rather than conclusions, and as the other points urged are covered by the decision cited we need not discuss them. We think the demurrer was improperly sustained.

REVERSED AND REMANDED.

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UNIVERSITY OF CHICAGO
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U.S.A.
ACQUISITIONS
LIBRARY

L. A. RUDA,
Appellee,

vs.

MARTIN L. JENNINGS,
Appellant.

210 I.A. 219

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a replevin suit in the Municipal Court of Chicago. The issues presented were as to both ownership and right to possession. The verdict was not responsive to the issue of ownership but merely to that of the right of possession. Where the title as well as the right to the possession is an issue and the verdict is only as to the right of possession, the issue as to title is not determined and a new trial should be granted. (Cobbey on Replevin, sec. 1058, and cases there cited; Rohe v. Pease, 189 Ill. 207, and cases there cited.) As the verdict and judgment should have settled the question of ownership, the motion for a new trial should have been allowed.

We also think the preponderance of evidence was in defendant's favor.

REVERSED AND REMANDED.

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DR. BENJAMIN H. BREAKSTONE,
Appellee,

vs.

THOMAS M. OBSBAUM,
Appellant.

210 I.A. 225

Appeal from
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee sued to recover for professional services, the character of which was not designated in the statement of claim, and the value of which was not stated as agreed upon. The affidavit of defense, sworn to by Mrs. Obsbaum, stated that the services were rendered in an unskillful manner, causing the affiant to suffer great pain and rendering it necessary for her to be treated by other physicians in order to be relieved therefrom; that such services were not worth over \$25, if anything, and that as advised affiant would be subjected to a large expense to be cured from the unskillful operation plaintiff performed upon her. Her affidavit of defense was stricken from the files, and for failure to file another in ten days both defendants were defaulted, and the court thereupon without calling a jury, which had been demanded by defendants, entered a judgment for \$445 as damages, the amount claimed in the affidavit to plaintiff's statement of claim. Manifestly the damages were unliquidated and could have been determined only by proof of their value. Manifestly, too, defendant's affidavit of merits stated a legal defense and was quite as definite and easily understood as the statement of claim. It was error for the court not

2101A.002

Appellate Court
of Illinois

Appellee

vs.

People of the State of Illinois

IN THE COURT OF APPEALS OF THE STATE OF ILLINOIS
SECOND DIVISION

Appellee moved to recover for professional services rendered to the appellant. The appellant's motion was not designated as the statement of claim, and the value of motion was not stated as a sum of money. The affidavit of damages, sworn to by Mrs. Chapman, stated that the services were rendered in an unskilled manner, causing the appellant to suffer great pain and discomfort. It is necessary for her to be treated by other physicians in order to be relieved therefrom; that such services were not worth over \$500, is admitted, and that an additional amount would be subjected to a large expense to be paid for the appellant's treatment. The appellant's motion was not designated as the statement of claim, and for failure to file motion in her own behalf, the appellant was defaulted, and the court thereupon without calling a jury, which had been summoned by the appellant, entered a judgment for \$400 as damages. The amount claimed in the affidavit to plain- tiff's statement of claim. Manifestly the damages were undi- rected and could have been determined only by proof of their value. Manifestly, too, the appellant's affidavit of motion stated a legal demand and was quite as definite and easily understood as the statement of claim. It was error for the court not

only to strike the affidavit of defense and enter a default, but also not to hear evidence and submit the question of damages to a jury, as demanded. Authorities on these fundamental propositions are unnecessary.

REVERSED AND REMANDED.

only to strike the individual of concern and enter a finding,
but also not to hear evidence and submit the question of
liability to a jury, as demanded. Authority on these
fundamental propositions are unnecessary.

Respectfully,
Yours truly,
[Signature]

315 - 23281

NORTH SIDE SASH & DOOR
COMPANY, a corporation,
Appellant,

vs.

IDA GOLDSTEIN et al.,
Appellees.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The only questions argued on this appeal are whether section 21 of the Mechanics' Lien Law of 1903, gives a subcontractor a lien on moneys due or to become due from the owner to the contractor, and whether there was a waiver of a lien to such moneys. Said section provides that the subcontractor shall have a lien "on the same property as provided for the contractor, and, also, as against the creditors and assignees, and personal and legal representatives of the contractor, on the material, fixtures, apparatus or machinery furnished, and on the moneys or other considerations due or to become due from the owner under the original contract."

The contract provided that "no subcontractor as well as the contractor shall have a right to place a lien on said premises whatsoever." By specific language the ^{so waived} lien/was limited to the "premises" and should be confined to the purpose manifestly intended by the parties. (Paulson v. Manske et al., 126 Ill. 72.) The waiver, therefore, does not affect the question here presented, namely, whether the subcontractor had a lien on the moneys still owing from the owner to the contractor, which the undisputed evidence shows

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WASHINGTON, D. C. 20315
ADJUTANT

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the only question argued on this appeal are whether section 31 of the Mechanics' Lien Law of 1903, gives a subcontractor a lien on moneys due or to become due from the owner to the contractor, and whether there was a waiver of a lien to such moneys. Said section provides that the subcontractor shall have a lien "on the same property as provided for the contractor, and, also, as against the creditors and assignees, and personal and legal representatives of the contractor, on the material, fixtures, apparatus or machinery furnished, and on the moneys or other considerations due or to become due from the owner under the original contract."

subcontractor has a lien on the moneys still owing from the not affect the question here presented, namely, whether the v. Munnick et al., 192 Ill. 73. The waiver, therefore, does to the purpose manifestly intended by the parties. (Hanson as waived lien was limited to the "promises" and should be confined on said promises whatsoever." By specific language the will as the contractor shall have a right to place a lien The contract provided that "no subcontractor or

was in excess of plaintiff's claim.

It is appellee's contention that the lien attaches only when the fund is claimed by some creditor, assignee, etc. We think the intent of the statute is to give a lien even as against the contractor's creditors, assignee or estate. In other words, the lien is absolute. Any other construction would in the absence of a claim by creditors or assignees, etc., defeat the main purpose of securing the subcontractor out of money so due from the owner to the contractor.

Aside from the question of fact, thus becoming immaterial, whether the waiver was written in the contract before its execution, there was nothing but the two questions of law in the case, whether the waiver, if made and executed, extended to moneys so due, (which was a matter of construction for the court) and whether a cause of action would lie for the lien in the absence of a claim by any creditors, etc. Hence plaintiff's motion for a directed verdict should have been granted. The judgment will therefore be reversed and a judgment entered here for the amount claimed and not in dispute, namely, \$624.99, being the balance due the subcontractor of \$501.80 with interest under the statute from May 14, 1913.

REVERSED. JUDGMENT HERE.

was in excess of plaintiff's claim.

It is appellant's contention that the claim attaches only when the fund is claimed by some creditor, assignee, etc. We think the intent of the statute is to give a lien even as against the contractor's creditors, assignees or others. In other words, the lien is absolute. Any other construction would be the essence of a claim by creditors or assignees, etc., against the said purpose of creating the subordination and of money so that the owner is the

beneficiary.

Before the question of fact, then becoming

material, whether the owner has waived in the contract before the execution, there was nothing at the two questions of law in the case, whether the waiver, if made and extended, extended to money so due, (which was a matter of construction for the court) and whether a cause of action would lie for the lien in the absence of a claim by any creditor, etc. Hence plaintiff's motion for a directed verdict should have been granted. The judgment will therefore be reversed and a judgment entered for the amount claimed and not in dispute, namely, \$5824.99, being the balance due the sub-contractor of \$901.50 with interest under the statute from May 14, 1919.

REVEREND JUSTICE.

315 - 23281

FINDING OF FACT.

We find that on May 14, 1913, there was due to appellant, North Side Sash & Door Company, a corporation, from appellee, Sam Tamon, the sum of \$501.80, and that there was then due from appellee, Ida Goldstein, as owner of the premises in question, to said appellee, Sam Tamon, as contractor, a sum in excess of said amount, on which appellant as subcontractor had a mechanic's lien.

1914 - 1915

STATE OF NEW YORK

IN SENATE,
January 14, 1915.
REPORT
OF THE
COMMISSIONER OF THE LAND OFFICE,
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1914.
ALBANY:
J. B. LEECH, STATE PRINTER,
1915.

JOHN A. TODD, a minor, by
John C. Todd, his next friend,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

3755
210 I.A. 227

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Todd, appellee, was a passenger on one of appellant's cars. Shortly before it stopped for him and his companions to alight, his arm was thrust through a glass door, causing the injuries complained of. By reason of repair work on the company's tracks there was a temporary switch laid between its east and west bound tracks, at or near the point of the accident, necessitating the car passing from one track to the other. It was plaintiff's contention that the car, which was going west, was on the north track until it struck and was about to cross the switch, when it lurched, throwing him into the glass door. It was defendant's contention that when plaintiff's arm went through the glass the car was not going over the switch, that it was on the other track, that there was no jar or other unusual motion, and that plaintiff jumped or suddenly threw up his hands against the glass door as a result of what is termed "goosing" or "jabbing in the seat of the pants" by one of his companions. There was much conflict in the testimony as to the motion, movement and place of the car at the time of the accident as well as to conduct and position in the car of plaintiff and his witnesses. Nearly all the material facts at issue

were controverted, and especially those bearing on the main charge of negligent operation of the car.

While we do not feel justified in finding that the verdict is manifestly against the weight of the evidence, it was nevertheless so close as to the facts bearing on the operation of the car as to require accurate instructions concerning the law. At plaintiff's request the following instruction was given:

"4. The court instructs the jury that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted, and the proper prosecution of the business, to prevent accidents to passengers riding in their cars."

In its limitation of the degree of care required of the carrier the instruction does not include "the practical operation of the road." For the same defect the judgment was reversed in Iri-City Ry. Co. v. Gould, 217 Ill. 317, and in No. Chi. St. R. R. Co. v. Polkey, 203 Ill. 225, where the same issue was involved, the refusal to give an instruction so limiting the degree of care required was deemed reversible error.

While correct instructions on the subject were given at the request of defendant we cannot say which instruction the jury followed - the correct or the incorrect. (Bald v. Neurenberger, 267 id. 616.) The jury's conception of what was a "proper" prosecution of the company's business may have been quite different from what was "practical". Hence the instruction was defective and misleading. (Ill. Match Co. v. C. R. I. & P. Ry. Co., 250 id. 396.) While we would not reverse because the word "prosecution" was substituted for the usual word "operation", yet the word "proper" is not synonymous with "practical", and gave the

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now is to get off on their own feet, and to

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(continued from p. 98) *XIII

Source: The author's calculations using data from the 1990 Census.

jury undue latitude in determining the question whether there was negligent operation of the road. We cannot disregard previous decisions on this subject and are compelled to reverse the judgment and remand the cause.

REVERSED AND REMANDED.

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JOHN STEIN, individually
and as trustee,
Appellant,

vs.

SOPHIE HOFF et al.,
Appellees.

210 I.A. 229

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellant filed a bill to foreclose a trust deed to him from appellee, Sophie Hoff, executed June 14, 1915, to secure the sum of \$554. Appellee, Emil W. Weber, filed a cross bill, individually and as successor in trust to Charles Weber, trustee, to foreclose a trust deed to the same premises, executed by Peter Hoff and his wife, said Sophie, February 2, 1907, to secure a debt of \$1000 to a firm, of which said Webers were members. The acknowledgment of the last mentioned trust deed was taken before Bertha Weber, another member of that firm. [The theory of appellant's bill is that said acknowledgment was void and that therefore the lien of the trust deed to appellant was superior to that of February 2, 1907, to the extent of the Hoff's homestead rights.] The issues presented raised as the main question whether the trust deed of February 2, 1907, was a mere extension or renewal of a previous trust deed of November 2, 1897, to the same trustee, executed by Friederike Wilkie to secure her note to her own order for \$1,000 in three years, which was released in 1901. *From a decision by the Supreme Court, 1915, 210 I.A. 229.*

There was no proof of any defect in the execution or acknowledgment of the Wilkie trust deed, which conveyed

2101.A.229

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT

JOHN BIRN, Individually
and as Trustee,
vs.
SOPHIE BORN et al.,
Appellees.

MR. FRANKLIN J. LUTHER, JR.
Counsel for the Plaintiff.

Appellant filed a bill to revoke a trust deed to him from appellee, Sophie Born, executed June 14, 1927, to secure the sum of \$500. Appellee, Emil W. Born, filed a cross bill, individually and as successor in trust to Sophie Born, trustee, to revoke a trust deed to the same parties, executed by Sophie Born and her wife, said Sophie, February 2, 1927, to secure a debt of \$1000 in a trust, of which said Sophie was trustee. The acknowledgment of the last mentioned trust deed was taken before Sophie Born, another member of that firm. The theory of appellant's bill is that said acknowledgment was void and that therefore the lien of the trust deed to appellee was superior to that of February 2, 1927, to the extent of the Heff's homestead rights. The issues presented raised in the main question whether the trust deed of February 2, 1927, was a mere extension or renewal of a previous trust deed of November 2, 1927, to the same trustee, executed by Sophie Born and her wife to secure her note to her, an order for \$1,000 in three years, which was released in 1931. There was no proof of any defect in the execution

the homestead rights then existing and was unquestionably a lien on the premises when conveyed to Peter Hoff in 1898. The deed to him was subject to the Wilkie trust deed. Upon his death in 1910 the entire fee passed to Sophie Hoff.

The decree finds that the deed of February 2, 1907, was a mere renewal of the security of the Wilkie trust deed and that there was no payment of the indebtedness secured by the latter. If the evidence adduced supports such findings it follows, as decreed, that the trust deed of February 2, 1907, merely continued the lien of the Wilkie trust deed and that it is prior and superior to any lien acquired by appellant on said premises, for the full amount of such indebtedness. If that contention is correct it is unnecessary to discuss any other question raised on this appeal.

While the testimony on this subject is meager it was all one way and there was no attempt to refute it. Aside from documentary evidence, it consisted of Mrs. Hoff's testimony as to the transactions. She testified that the money paid down on the purchase price belonged to her and her husband jointly; that the balance of the purchase price had never been paid; that they kept up the interest on the balance represented by the Wilkie note and trust deed; that every three years they made "new papers" for the \$1,000 and that the last of the new papers was the deed of February 2, 1907. Charles M. Weber was named as the trustee in the Wilkie trust deed and that of February 2, 1907, and presumably, from Mrs. Hoff's testimony, in the intervening "new papers".

While the character of the "new papers" was not specifically described, the evidence sufficiently indicates that whatever their form they were intended to continue in

the Homestead which then existed and was subsequently
a lien on the premises then conveyed to Peter Holt in 1897.
The deed to him was subject to the \$1000 trust deed. Upon
his death in 1910 the entire fee passed to Peter Holt.
The dectee finds that the deed of February 2,

1897, was a mere transfer of the property of the Wilkie
trust deed and that there was no payment of the indebtedness
secured by the latter. If the evidence adduced suggests
such findings it follows, as stated, that the trust deed
of February 2, 1897, merely continued the lien of the Wilkie
trust deed and that it is given and subject to any lien
secured by mortgage on said premises. For the full amount
of such indebtedness. It was concluded as between it is
unnecessary to discuss any other question raised on this

appeal.

While the testimony on this subject is meager it
was all one way and there was no attempt to refute it. Aside
from documentary evidence, it consisted of Mrs. Holt's
testimony as to the transactions. She testified that the
money paid down on the purchase price belonged to her and
her husband jointly; that the balance of the purchase price
had never been paid; that they kept up the interest on the
balance represented by the Wilkie note and trust deed; that
every three years they made "new papers" for the \$1,000 and
that the last of the new papers was the deed of February 2,
1897. Charles E. Weber was named as the trustee in the Wilkie
trust deed and that of February 2, 1897, and presumably,
from Mrs. Holt's testimony, in the intervening "new papers".

While the character of the "new papers" was not

specifically discussed, the evidence overwhelmingly indicates

force the lien of the Wilkie trust deed. If such intention existed then the change in the evidence of the debt or the form of security therefor did not cancel the old debt, (Farrand v. Long, 184 Ill. 100; Roberts v. Dean, 180 id. 187; Campbell v. Trotter, 100 id. 281; Black on Mortgages, secs. 278, 279) and the Hoffs by a subsequent conveyance acquired no right of homestead as against the lien thus kept alive, and hence there was no necessity for the relinquishment of the same. (Symonds v. Lappin, 82 id. 213.)

The court's findings to the effect that the original lien of the Wilkie deed continued under the form of the trust deed of February 2, 1907, and was valid as against any subsequently acquired rights of homestead in the Hoffs, and was therefore superior to any right or lien acquired by appellant, are supported by the evidence, and are in conformity with settled principles of law and equity.

AFFIRMED.

PEOPLE OF THE STATE OF
ILLINOIS ex rel JAMES C.
BAILEY,

Defendant in Error,

vs.

CITY OF CHICAGO et al.,
Plaintiffs in Error.

210 I.A. 230

ERROR TO

CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from an order for mandamus to compel respondents to place relator's name on the list of offices of the police department of the City of Chicago as a first-class detective sergeant of police, from which relator claimed to have been reduced in rank in May, 1895, over 20 years before he filed his petition. A general demurrer by respondents was overruled and they elected to abide by the same.

The case is not different in principle or controlling facts from many others adversely passed on by this court and the Supreme Court, and the case of People ex rel. Gersch v. City of Chicago et al., 252 Ill. 561, is specially applicable. Petitioner's claim of right to retain the position of detective sergeant is based on the civil service act. But it appears from his petition that he was demoted from that position to the rank of patrolman before the civil service act went into effect. What was said in the Gersch case, supra, is controlling, namely, that that act gave protection from removal only to those who had been examined and approved by the civil service commission and did not prohibit the removal of others

210 L.A. 280

SECTION 20

CHICAGO COURT

RECORDS OF THE CITY OF CHICAGO
 DIVISION OF THE CLERK OF THE COURT
 CHICAGO, ILLINOIS

Defendant in Error

CITY OF CHICAGO et al.

THE HONORABLE JUSTICE OF THE PEACE
 IN THE COURT OF THE CITY OF CHICAGO

This appeal is from an order for mandamus to compel respondents to place petitioner's name on the list of officers of the police department of the City of Chicago as a first-class detective sergeant of police, from which petitioner claimed to have been removed in May, 1935, over 20 years before he filed his petition. A general summary by respondents was overruled and they elected to stand by the same.

The case is not different in principle or controlling facts from many others adversely passed on by this court and the Supreme Court, and the case of People ex rel. George v. City of Chicago et al., 282 Ill. 661, is equally applicable. Petitioner's claim of right to retain the position of detective sergeant is based on the civil service act. But it appears from his petition that he was demoted from that position to the rank of patrolman before the civil service act went into effect. That was said in the George case, supra, is controlling, namely, that that act gave protection from removal only to those who were promoted and removed by the civil service.

without written charges or a hearing.

We think, too, the demurrer should have been sustained on the ground of laches. (Kenneally v. City of Chicago, 220 Ill. 485; Schulthies v. City of Chicago, 240 id. 167.) Accordingly the judgment will be reversed.

REVERSED.

STANDARD - CIVILIAN - CHANGES IN A JOURNAL.

We think, too, that the Government should have been
maintained on the ground of law. (See United States v. Lutz
of Orleans, 200 Ill. 488; United States v. Lutz of Illinois,
200 Ill. 487.) Accordingly the judgment will be reversed.
REVEREND.

PEOPLE OF THE STATE OF
ILLINOIS ex rel. EDWARD
STRUM,

Defendant in Error,

vs.

THE CITY OF CHICAGO et al.,
Plaintiffs in Error.

210 I.A. 232

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from an order reinstating relator Strum on his petition for mandamus filed in May, 1915, to the position of first-class detective sergeant. A general demurrer thereto was overruled and respondents elected to abide by the same.

The right to such reinstatement is predicated on the civil service act. The petition shows that prior to the time it went into effect the petitioner held the position of patrolman on the police force of Chicago and that in some manner, not definitely set forth, he was on March 14, 1897, given the position to which he asked to be reinstated, and continued to exercise its duties until July 1st of that year, that his salary therefor was certified to by the civil service commission, and that he was illegally reduced to the position of patrolman in July, 1897, by order of the superintendent of police.

It is enough to say that as held in People ex rel. Gersch v. City of Chicago et al., 242 Ill. 561, the facts do not bring his case within the protection afforded by the civil service act against removal or demotion unless he was

examined and appointed or promoted to such position by the civil service commission.

Besides the demurrer should have been sustained on the ground of laches in filing the petition. (Pennsylvania v. City of Chicago, 212 id. 481.) Accordingly the judgment will be reversed.

REVERSED.

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

ROBERT SUSMARSKI and DONALD
McDONALD,

Plaintiffs in Error.

210 I.A. 233

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error, Susmarski and McDonald, were convicted of a criminal conspiracy. Wright, a third defendant, was found not guilty.

As we have reached the conclusion that the evidence justified the verdict, it would subserve no useful purpose to discuss the claim to the contrary, or the contention that it did not show an active participation in the conspiracy by Susmarski. Nor need we consider the refusal to give an instruction that the jury should find him and Wright not guilty if the jury believed from the evidence that they had merely a passive knowledge of McDonald's fraudulent and illegal acts, inasmuch as other instructions sufficiently covered the subject. The remaining and principal point urged for reversal is that it was error to admit in evidence a confession by defendant McDonald made out of the presence of his co-defendants. In support of this contention reference is made to People v. Buckminster, 274 Ill. 435.

We do not think the cited authority is applicable to the record in this case for two reasons; first, because it is apparent that the case was tried according to plaintiffs in error's own theory that the confession was admissible

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ATTENTION

1. Subject: Mr. [REDACTED]

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1. The first step is to identify the problem or goal. This involves understanding the current situation and what you want to achieve. It's important to be clear and specific about your objectives.

As we have reached the conclusion that the witness testified the vehicle, it would therefore be logical to suppose that the claim is in fact correct, or the conclusion that it is incorrect.

It is not clear from the evidence whether the defendant was aware of the fact that the defendant was a member of the Communist Party at the time of the commission of the crime. The evidence is inconclusive on this point.

It is apparent that the case was tried according to plan. In the record is this name for the witness; that, however, we do not think the cited authority is applicable to People v. Rosenberg, 274 Ill. 486.

as to the party making it but should be disregarded as to them under proper instructions, which were given; and, second, because the confession was such that the part affecting Busmarski could not be excluded and leave anything that would tend to incriminate McDonald of the charge made against him.

At the time of the trial the decision in the Buckminster case had evidently not been published nor brought to the attention of either the court or counsel for plaintiffs in error. The record discloses that they recognized throughout the trial what had been "the usual rule" as said in the Buckminster case, namely, "that such confession can be admitted against the one who made it, with instructions by the court to the jury that it is only admitted against that one defendant, and is not to be considered as evidence against his codefendant." (p.444) They ought not to be permitted to take a different position here.

The record shows that three different witnesses testified to McDonald's confession. Kucki, the prosecuting witness, testifying first, stated that he was present at a conversation between McDonald and two police officers, and was asked "what was the conversation?" No objection was made thereto. The witness answered "Murphy" (alias McDonald) "said that Busmarski has put the job up to him, and it looks so good to him that he couldn't help but take it." Busmarski's attorney objected on behalf of Busmarski, and moved that the answer be stricken out. The court said, "objection sustained with reference to conversation being admitted in evidence as to Busmarski and Wright." Thereupon their attorneys asked for, and there was given, an oral instruction that the conversation not be taken into consideration so far as their clients were concerned. The witness then repeated, "Murphy said that Wright and Busmarski came to him one Sunday after-

noon and laid this job over to him. He thought it was so easy that he fell for it." Susmarski's attorney again interposed a general objection, and the court said "all this testimony does not apply to Susmarski and Wright," and the attorney was apparently satisfied. The police officers were then called as witnesses. The first officer was asked to state what was said at that conversation. Wright's attorney then said "the same objection", and the court said "objection sustained with reference to the defendants Wright and Susmarski." McDonald's attorney then objected and his objection was overruled. The witness then testified briefly to the effect that McDonald said that Susmarski went to Wright and said that he had a job with money in it; that there was a business man going around with a married woman; that Wright didn't want to handle it; that they came to his house "and put the proposition to him" and went to a saloon and pointed out Kucki as the victim, and that he then trailed Kucki for several days; that he was induced to go into it by the other two. This is substantially all of his testimony and at the end thereof the attorney for Susmarski said, evidently satisfied with that course of procedure, "Of course your honor has instructed the jury to disregard any testimony of this witness concerning Susmarski".

The other officer then testified, saying that he arrested McDonald, took from him \$50 (which Kucki claimed to have given McDonald) and took him to the detective bureau where the conversation referred to took place. He was then asked, "was there anything said about the \$50 that you took off him at the detective bureau?" Wright's attorney said "the same objection as before". Whereupon the court said "this is only admissible as to McDonald." The witness

He had said this over to him. He thought it was so
 only that he felt for it. "Consequently," the witness
 introduced a general objection, and the court said "all this
 testimony does not apply to 'Kumarski and White,'" and the
 attorney was apparently satisfied. The police officers were
 then called as witnesses. The first officer was asked to
 state what was said at that conversation. "White's attorney
 then said 'the same objection,' and the court said 'objection
 sustained with reference to the testimony of White and
 Kumarski.'" "Kumarski's witness then objected and the
 objection was overruled. The witness then testified briefly
 to the effect that Kumarski said that Kumarski went to
 Wright and said that he had a job with money in it; that
 there was a business man going around with a married woman;
 that Wright didn't want to handle it; that they were to be
 home "and put the proposition to him" and went to a station
 and waited but didn't see the victim, and that he then
 traveled back for several days; that he was intended to go
 into it by the other two. This is substantially all of his
 testimony as to the conversation between the three. "The
 court said, 'evidently satisfied with that course of procedure,'" "the
 court then asked the witness how many he observed any
 testimony of this witness concerning Kumarski."
 The other officer then testified, saying that he
 extended Kumarski, took him to the station where he
 have given Kumarski and took him to the detective bureau
 where the conversation referred to took place. He was then
 asked, "was there anybody else about the 2nd that you took
 up to the detective bureau?" "White's attorney said
 "the same objection as before." "Overruled the court said

answered that McDonald "did not try to run away or anything like that. It is legitimate," which in no way related to his co-defendants. Thereupon the witness was asked if anything further was said. No one objected except McDonald's attorney. The witness answered in substance that he said that Busmarski and Wright got him to go down to the saloon; that he was supposed to meet Busmarski and Wright "but that morning he was busy at the house and he came down on a telephone call." There was no objection and no motion to strike this testimony.

It is manifest from the foregoing that the attorneys for Busmarski and Wright proceeded upon the theory that the evidence should be received but limited in its application to the party making the confession. Their objection to the testimony was general and not to any particular part of the confession. It was said in McCann v. The People, 226 Ill. 562, "the objection of the plaintiff in error to the admission of said statement went to the entire statement, and not to that part, only, which tended to incriminate the plaintiff in error. Had the objection been limited to the part of the statement which tended to incriminate the plaintiff in error the objection would doubtless have been sustained." (p. 569)

In People v. Anderson, 239 id. 148, the receiving of a written statement by two of Anderson's codefendants made after their arrest, implicating him as acting with them in criminal concert, was urged as error. The court said, "If there was in their statement anything the effect of which was to indicate the guilt of Anderson without tending to show the guilt of the man making the statement that part of the statement was not properly admissible in this case

answered that defendant told her to run away on Saturday
like that. It is in defendant's affidavit which is no way related to
his co-defendant. Therefore the witness was asked if any-
thing further was said. He now objected except defendant's
statement. The witness answered in substance that he told
that defendant and Wright got him to go down to the station;
that he was supposed to meet defendant and Wright and that
something he saw them at the house and he came down on a
telephone call. There was no objection and he went on to
give this testimony.

It is recalled from the transcript that the evidence
for defendant and Wright presented was two letters that the
evidence showed he received and looked in his apartment to
the party making the statement. Their objection to the
testimony was general and not as any particular part of the
evidence. It was said in People v. The People, 200 Ill.
320, "the objection of the plaintiff in error to the admission
of said statement was on the entire statement, and not to
that part, only, which tended to incriminate the plaintiff in
error. And the objection was limited to the part of the
statement which tended to incriminate the plaintiff in error.
The objection would therefore have been overruled." (p. 320)

It is recalled that in People v. The People, 200 Ill.
of a written statement by two of defendant's co-defendants
made after their arrest, incriminating him as well as them
in criminal conspiracy, was upheld on appeal. The court said,
"It is not an error to admit evidence against the other of
which was in incriminate the guilt of defendant without looking
to show the guilt of one when making the statement that part
of the statement was not properly admissible in this case

where Anderson was on trial. There is no part of their statement which could have been excluded on that theory. Each of the written recitals was properly admitted in evidence as against the man making it." (p. 180) No motion was made here to exclude any particular part of the confession, and, it does not appear that any part of the statement could have been excluded and leave anything tending to show that the party making the statement was guilty of the charge of conspiracy. The confession related entirely to the part he played with his codefendants. In this respect the evidence differs from that in the Buckminster case. There the evidence implicating the party confessing was complete without any reference to that part which tended to incriminate Buckminster. It was said in the Buckminster case, "the reading of this confession admitted in evidence shows clearly that Wink had confessed his own guilt before he said anything as to Buckminster being connected with the crime. The trial court should have sustained plaintiff in error's objection to admitting that part of the confession that connected him in any way with causing the fire." (p. 447)

It thus appears that the plaintiff in error, Susmarski, not only failed to object to that part of the confession which tended to incriminate him, as in the McCann case it was held necessary to do, but that the case at bar is like the Anderson case and differs from the Buckminster case in that no part of the confession could be excluded and leave in intelligible form the part unquestionably admissible against the person making the confession.

If the judgment be affirmed as to Susmarski it must be as to McDonald, whose claim to reversal rests on errors assigned by Susmarski.

AFFIRMED.

where witness was on trial. There is no part of their
statement which could have been excluded on that theory.
Each of the written exhibits was previously admitted in evidence
in the trial of the defendant (p. 10). It is true that
there is evidence and questions of fact of the defendant, and
it does not appear from any part of the statement which has
been excluded and leave anything remaining to show that the
party making the statement was guilty of the offense of con-
spiracy. The confession related directly to the fact of
being with the defendant. In this respect the evidence
indicates that in the Whitaker case. There the evidence
indicated the fact that the defendant was guilty of the
offense of that fact which would be inadmissible. In
it was said in the Whitaker case, "the finding of this
confession admitted in evidence shows clearly that this was
confessed to and while before the jury it was admitted as to
the defendant's guilt, it was not the same as the fact of
guilt. It was admitted as to the defendant's guilt, it was not
admitted that part of the confession that concerned him in
any way with the fact of the crime." (p. 107)
It thus appears that the statement is correct.
However, not only failed to object to any part of the con-
fession which tended to incriminate him, but in the Whitaker case
it was held necessary to do, but that the fact of his
the Whitaker case and differ from the Whitaker case in that
part of the confession could be excluded and leave in admis-
sible fact for the jury to determine whether or not
it was the confession.

If the judgment be affirmed as to defendant it will
be as to defendant, which shall be reversed and as to

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

ARTHUR W. ROBERTSON et al.,
Plaintiffs in Error.

210 I.A. 234

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error were convicted upon an indictment charging a criminal conspiracy.

The charge which the evidence tended to support was that of a conspiracy to "procure" dynamite with intent to use the same for unlawful injury to and the unlawful destruction of property. The act regulating the use of explosives makes procuring them with such intent a felony. (Par. 54h, Ch. 38, R. S. Hurd's 1916.)

The indictment is attacked because it does not specify a particular person or property as the object of intended injury, citing cases from other jurisdictions of a conspiracy to defraud that was directed to a particular individual or class. The authorities concur that the rule does not apply where the object of the conspiracy is general. As said by Mr. Justice Cooley in People v. Arnold, 46 Mich. 268, "It is necessary to permit this general form of pleading, or some of the worst and most mischievous conspiracies would escape punishment altogether." The same point was made in People v. Smith, 239 Ill. 91, where the court said: "As it was not necessary to prove that the conspiracy was formed to cheat or defraud a particular

468.A.1012

CRIMINAL
COURT

RECORD OF THE COURT OF
ILLINOIS

RECORDED IN BOOK

101

RETURN OF JURY
FINDINGS IN CASE

THE HONORABLE JUSTICE
OF THE PEACE

Indictments in cases were assigned to the

Indictments assigned to the

Indictments assigned to the

was that of a conspiracy to "procure" dynamite with intent

to use the same for unlawful injury to and the unlawful

destruction of property. The act requiring the use of

explosives makes procuring same with such intent a felony.

(Rev. Stat. Ch. 38, Sec. 101, R.S. 1913.)

The indictment is attacked because it does not

specify a particular person or persons as the object of

indictment. It is held that this is not a violation of

a conspiracy to defraud that was directed to a particular

individual or class. The indictment is correct and the plea

is not validly made on the ground of its vagueness.

Reversed. as held by the Illinois Court in People v. Arnold.

As held in 1908, "it is necessary to permit this general term

of conspiracy, as held in the case of People v. Arnold, 1908.

"The court will reverse the judgment of the court."

There was also in People v. Arnold, 1908 Ill. 11, where the

plea is held that it was not necessary to state that the

person in order to show the guilt of the plaintiff in error, it was not necessary to aver in the indictment that the conspiracy was formed against any particular person." In the instant case there was evidence showing that the purpose of the conspiracy was partially accomplished by the destruction of both public and private property, and that other attempts to effect it would have had like results but for their miscarriage. While the conspiracy seems to have been directed primarily against the property of the Commonwealth Edison Co. there was much evidence to show that the plan to injure its property necessarily involved from its location and character injury to other property in the neighborhood. The overt acts proven either resulted, or if fully consummated would have resulted, in injury to improvements belonging to the city, and to corporations using its manholes where dynamite was placed, and to property of adjoining owners. What property might have been affected by a consummation of the plan, had the parties not been arrested, could be known only in the course of accomplishing its ends. Injury or destruction of property in general, therefore, was as much in the scope of the conspiracy as injury to that belonging to said company. Hence we do not think it was necessary to specify, under such circumstances, any particular person or property in the indictment.

But the act regulating the use of explosives in and of itself makes it a crime to procure an explosive with intent to use it for unlawful injury to any property in any place. The language of the act embodies all of the essential elements of the crime created by it. An indictment for such crime in that language would be sufficient. (Sec. 6, Div. XI,

... is other to show the value of the ...
... is not necessary to show in the ...
... the ...
... In the ...
... of the ...
... of ...
... other ...
... the ...
... been ...
... the ...
... plan to ...
... action ...
... neighborhood. The ...
... fully ...
... belonging to ...
... where ...
... that ...
... plan, ...
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... would ...
... circumstances, ...
... initial ...
... But the ...
... and ...
... intent ...
... given ...
... evidence ...

Criminal Code) and no greater particularity is required when its commission is made the object of a conspiracy. Hence, we think the motion to quash was properly denied.

It is also urged that there was a merger of the conspiracy in the felony, and that it was error to refuse instructions to that effect. How far the doctrine of merger may have been recognized in this state before the decision in People v. Darr, 255 Ill. 456, need not be discussed, as since then it has been regarded as practically abrogated, as it is in many other jurisdictions. This was the view taken of the doctrine in People v. Simpson, 198 Ill. App. 528.

527
A variance is urged, predicated mainly on the claim that the evidence showed one particular object of the conspiracy, - injury to the property of the Commonwealth Edison Co. The point was not made below, but had it been, what we have said respecting the scope of the conspiracy and the proof admissible to support it sufficiently answers the contention. Plaintiffs in error could not have intended, under the circumstances, to injure said company's property without also contemplating the injury of other property in its immediate vicinity, and they should not be permitted to escape under the technicality that the proof shows a specific purpose to injure said company's property when it also shows as a natural consequence that there would be injury to the property of others as well.

It is urged that the evidence does not support the verdict and the judgment. Having reached the conclusion that it does, we shall not undertake to analyze the evidence. But even if, as contended by plaintiffs in error, one of them

Original Code) and no greater particularity is required when its commission is made the object of a conspiracy. Hence, we think the matter is much less properly denied. It is also urged that there was a merger of the

conspiracy in the felony, and that it was either a release instructions to that effect. Now for the doctrine of merger may have been recommended in this state before the decision in People v. Perry, 223 Ill. App. 450, need not be discussed, as it is in many other jurisdictions. This was the view taken of the doctrine in People v. Simpson, 198 Ill. App.

A variance is urged, predicated mainly on the claim that the evidence showed one particular object of the conspiracy - injury to the property of the Commonwealth Edison Co. The point was not made below, but had it been what we have said respecting the scope of the conspiracy and the proof admissible to suggest it sufficiently answers the contention. Blatant error could not have intended. Most the circumstances, in light of the evidence without also contemplating the injury of other property in its immediate vicinity, and they should not be permitted to escape under the technicality that the proof shows a specific purpose to injure said company's property when it also shows as a natural consequence that there would be injury to the property of others as well.

It is urged that the evidence does not support the verdict and the judgment. Having reached the conclusion that it does, we shall not undertake to analyze the evidence.

alone took the initiative without knowledge of the others and stole and secreted the dynamite, still if the parties acted in concert upon a plan to go and get the explosive from wherever it was hidden or placed and thus bring it into their possession for the purpose of making such unlawful use of it, such a state of facts would constitute a conspiracy to "procure". Instructions presenting a different theory were properly refused.

It was shown that each of the plaintiffs in error made a confession after his arrest which the prosecution introduced in evidence only so far as it affected the defendant making it, thus endeavoring to comply with the rule laid down in People v. Buckminster, 274 Ill. 425. On cross examination defendants' counsel asked for the entire statement, expressly stating to the court however that if the answer brought out anything implicating other codefendants than the one making the statement they would move to strike the entire statement from the record. The record discloses no purpose or effort to learn whether the rest of the statement would have benefited plaintiffs in error. We cannot view such attitude as taken in good faith, or otherwise than a trap for error by playing one rule of evidence, under the pretense of a right thereto, against another which the court was rightfully seeking to enforce. The circumstances suggest bad faith and an effort to make a mere game of the trial.

Defendants presented to the court a written instruction bearing upon their competency to testify in their own behalf. A part of it only was read to the jury, the court intending but neglecting to strike out the remainder of the instruction that was not read. The jury were handed the entire instruction when they retired. The failure to read part of it is urged as error. That part should

properly have been eliminated as the court intended. The substance of the contention, therefore, is that while the defendants had the benefit of an entire instruction they asked for, but to part of which they were not entitled, yet because said part was not read to the jury in accordance with the practice, the failure to read it constituted reversible error. It would be a travesty on justice to give force to such a technicality.

The instruction as to the different forms of verdict prescribed the three different forms of punishment designated by statute, including imprisonment in the penitentiary. This was urged as error as to plaintiff in error Campbell, because at one time he testified that he was 24 years old and afterwards that he was 25 and was born in September, 1891. But on further examination he repudiated these statements by saying that he did not know how old he was, "to tell the truth", and admitting that he had previously given a written statement showing that he was more than 25 years old. The court was warranted in recognizing that the testimony was one way, showing he was subject to punishment in the penitentiary, and not in the reformatory.

It is complained that the jury were not instructed as to the effect of an involuntary confession. There was nothing in the evidence tending to show that the confessions were not voluntary, the only position taken by defendants being that they were not made at all.

We find no reversible error and deem most of the points urged as purely technical.

AFFIRMED.

probably have been admitted as the correct statement. The
 statement of the Government, however, is that while the
 defendant had the right to an action in the court they
 failed to, and as a result of which they were convicted, and
 because this fact was not part of the story in the
 with the fact, the failure to pay is considered
 reversible error. It will be a tragedy on the part of the
 State to lose a defendant.

The instruction as to the defendant's form of

verbal statement in the defendant's form of statement
 designated by number, including instructions in the
 defendant's form. This was stated as error as to the
 other defendant, because it was not stated that he was
 to make any statement and that he was not to make any
 statement, 1931. And on the other hand the defendant
 clearly statements by saying that he did not know how to
 say, "I did not know", and "I did not know" and "I did not know"
 given a written statement showing that he was not to
 state any. The court was concerned in maintaining that the
 defendant was not to say, showing he was not to say
 in the defendant's, and not in the defendant's.

It is emphasized that the fact was not intended
 as to the effect of an involuntary confession. There was
 nothing in the evidence leading to show that the confessions
 were not voluntary, the only position taken by defendant being
 that they were not made at all.

There was no reversible error and the case of the
 State is hereby affirmed.

ISIDOR BINDER, Appellee,

vs.

HERMAN ALTMAN, Appellant.

210 I.A. 237

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$3500.00. The cause was tried by a jury, who assessed the plaintiff's damages at the sum of \$5535.25, but the court required the plaintiff to enter a remittitur for the amount in excess of the sum first above mentioned.

By this action plaintiff sought to recover damages for the breach of a contract of employment; for the unlawful conversion of property belonging to a corporation; and to enforce an accord based upon an alleged compromise of such damages. It appears that the judgment of the court is entirely irreconcilable with the verdict of the jury. The verdict seems to have been based upon the theory of a conversion of certain property, while the judgment of the court was apparently based on an accord.

It has been held that an action will not lie to enforce an unexecuted accord unless it contains an express provision that the promise itself shall be a satisfaction of the disputed claim. (Simmons v. Clark, 56 Ill. 96.) The accord in question contains no such provision. The court therefore erred in entering judgment thereon.

From an examination of the record we cannot escape the conclusion that the defendant in his dealings

10101. A. 287

RECEIVED

CHICAGO, ILL.

MR. JUSTICE MORGAN, CHIEF JUSTICE OF THE SUPREME COURT.

This is an appeal by the defendant from a judgment

rendered for \$2500.00. The cause was tried by a jury, the

assessed the plaintiff's damages at the sum of \$2500.00, but

the court required the plaintiff to enter a verdict for

the amount in excess of the sum first above mentioned.

It was held that the plaintiff was entitled to recover damages

for the breach of a contract of employment; for the unlawful

conversion of property belonging to a corporation; and for

enforce an accord based upon an alleged compromise of such

damages. It appears that the judgment of the court is

entirely irreconcilable with the verdict of the jury. The

verdict seems to have been based upon the theory of a con-

version of certain property, while the judgment of the court

was apparently based on an accord.

It has been held that an action will not lie to

enforce an unexecuted accord unless it contains an express

provision that the promise itself shall be a satisfaction

of the disputed claim. (Winn v. Clark, 22 Ill. 28.)

The accord in question contains no such provision. The

court therefore erred in entering judgment thereon.

From an examination of the record we cannot

with the plaintiff was guilty of palpable fraud.

In view of his admission in his brief, that the plaintiff, under the pleadings and evidence, is entitled to a judgment for \$460.00 for wages, the judgment will be affirmed for said amount upon the entry by plaintiff of a proper remittitur; otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR, OTHERWISE
REVERSED AND REMANDED.

with the plaintiff was guilty of culpable fraud.
In view of his admission in his brief, that the
plaintiff, under the pleadings and evidence, is entitled
to a judgment for \$100.00 in wages, the judgment will be
affirmed for said amount upon the entry by plaintiff of a
proper remittitur; otherwise it will be reversed and the
cause remanded.

WILLIAM H. HARRIS, JUDGE
CLERK OF COURT

210 I.A. 244

HENRY FELAU,
Appellee,

vs.

LAKE SAND COMPANY, a
corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for \$11,500.00 recovered by plaintiff in an action on the case for personal injuries. Inasmuch as the judgment must be reversed and the cause remanded for a new trial for errors hereinafter pointed out, a detailed statement of the facts would serve no useful purpose.

It is insisted by defendant that the verdict and the judgment are not supported by the evidence and that the judgment should be reversed with a finding of facts. While it may be conceded that the case is a close one on the facts, yet the record shows that the evidence was conflicting on the issues involved, and we are not disposed to disturb the jury's finding thereon.

It is next contended that the record contains reversible error, both in the admission of improper evidence and in the argument of plaintiff's counsel to the jury.

Plaintiff's medical expert, one Dr. MacLeod, in describing the nature and extent of plaintiff's injuries, testified as follows:

- Q. Are you still treating him?
- A. Yes, he comes up to have dressings put on, small dressings put on that small wound.
- Q. Is there any understanding between you, or agreement?

STO. A. 1014

STO. A. 1014
STO. A. 1014
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STO. A. 1014

STO. A. 1014

This is an appeal by defendant from a judgment for \$11,500.00 recovered by plaintiff in an action on the case for personal injuries. Judgment on the judgment was reversed and the case remanded for a new trial for errors mentioned in the opinion. The facts would serve as a basis for the trial.

It is further by defendant that the verdict and the judgment are not supported by the evidence and that the judgment should be reversed with a finding of facts. While it may be said that the case is a close one on the facts, yet the record shows that the evidence was conflicting on the issues involved, and we are not disposed to disturb the jury's finding thereon.

It is also contended that the record contains reversible error, both in the admission of incompetent evidence and in the argument of plaintiff's counsel to the jury. Plaintiff's medical expert, one Dr. Beckel, in describing the nature and extent of plaintiff's injuries,

STO. A. 1014

STO. A. 1014
STO. A. 1014
STO. A. 1014

- A. I have no agreement nor nothing of the kind. I simply felt sorry for the poor fellow. He had no money. He has been really a pensioner of mine, so to speak. We all have our pensioners at times. I have always taken care of Henry on that basis. I never figured on getting paid for it. We do a certain amount of charity work. I felt sorry for the fellow. * * * I went down in my own clothes and bought serums for the man, had a streptococci serum, paid \$1.50 a dose for it and put that into the man.

On motion of the defendant, that part of the witness's answer which related to plaintiff's impecunious condition was stricken out. It is insisted, however, that the error was not cured thereby, and that the court erred in denying the motion of defendant to withdraw a juror and continue the case.

It appeared from the evidence that one Behn, the engineer in control of the device, and through whose alleged negligence plaintiff claimed to have been injured, visited the office of and conferred with plaintiff's counsel during the progress of the trial, and before he was called to testify on behalf of the defendant. Plaintiff's counsel, in his argument to the jury attempted to explain this occurrence and his failure to call the said witness to testify on behalf of the plaintiff and in doing so stated to the jury:

"Those two men have a deep motive, especially Behn, in this case; I don't think it would have been fair for me to put Behn on the stand, and ask him to incriminate himself."

To this argument defendant interposed an objection, whereupon plaintiff's counsel continued:

"By 'incriminate' I don't mean anything criminal, gentlemen. I simply mean this; I am trying to make it plain that man has a deep motive, of course. It isn't human nature for a man to take the stand and say, 'Yes, it was my fault for crippling a human being for the rest of his life.' Isn't that a pretty hard thing to put up to a man, to ask him to do that? Do you think I should have done it?"

Again, in discussing the pain and suffering endured by plaintiff while being treated by his physician, counsel stated:

a. I have no objection nor opinion of the kind.
I simply told Harry for the past few years. He had
no money. He had been badly treated and
killed, and he was. He all have one general
idea, I have always been out of money on
the basis. I never thought of anything but
the fact that I was a poor man. I was a
poor man for the whole world. I was a
poor man in my own office and I was a poor
man, and I was a poor man, and I was a poor
man. I was a poor man for the whole world.

On the basis of the testimony, that gave of the witness's account
which related to the witness's testimony and the witness
out. It is insisted, however, that the error was not cured
thereby, and that the error was in keeping the matter of
testimony as a whole and continuing the matter.
It appeared from the witness's testimony that the witness
engineer in contact of the witness, and the witness's account
testimony related to the witness's testimony, related
the witness of and contacted with the witness's account during
the progress of the trial, and before he was asked to testify
on behalf of the defendant. The witness's account, in his
argument to the jury, attempted to explain this occurrence and
his failure to call the said witness to testify on behalf of
the plaintiff and in doing so stated to the jury:

"There are two men here a deep motive, especially
born, in this case; I don't think I would have been
able to get them on the stand, and I don't
understand it."

To this argument defendant introduced an objection, whereupon
the witness's account continued:

"I don't know anything about it,
anyhow. I simply mean this; I am trying to make
the plain man have a deep motive, of course. It
was a human nature for a man to take the stand and
say, 'Yes, it was my fault for neglecting a human being
and the rest of his life.' I don't think a deeply
going to get up to a man, to get him to do that. Do
you think I should have done it?"

Again, in discussing the plain and the witness's account to the jury.

"Don't you think he (plaintiff) suffered intense pain when the doctor took out those three pieces of bone from that leg? * * * Do you know what that means? The worst of it is, without an anaesthetic; without the humanity of that."

While we are not unmindful of the fact that counsel should be allowed considerable latitude in his argument to the jury, yet in an action of this character, where the evidence is close and conflicting on the vital issues, the record should be free from prejudicial error. The evidence of plaintiff's poverty, and the remarks of his counsel hereinabove referred to, were of such character as to practically deprive the defendant of a fair and impartial trial as contemplated by law. The judgment must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

E. A. HEY,
Appellee,

vs.

UNITED STATES BOTTLERS'
MACHINERY COMPANY,
Appellant.

210 I.A. 245

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for \$923.75 entered in favor of appellee, plaintiff below, in an action for a balance due on account of commissions.

During the year 1913, defendant was engaged in the manufacture and sale of certain machinery used for bottle washing and filling purposes. In October of the said year, plaintiff induced the defendant to engage in the manufacture and sale of certain tomato pulping machines, and at the same time an oral agreement was entered into between the parties, by the terms of which plaintiff was employed to solicit orders for the sale of both of said mentioned machines. Pursuant thereto, plaintiff obtained numerous orders for said machines which were accordingly shipped to the purchasers by the defendant. The orders procured by plaintiff were in writing and contained an express guaranty that the machines would give satisfaction to the purchaser. Subsequently it developed that a number of the pulping machines so shipped proved unsatisfactory and were either returned by the purchasers or were retained after the defendant had made certain alterations in their construction or a suitable allowance in price. In all cases

2101A.245

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

VS.

IN CHANCERY

UNITED STATES PORTLAND CEMENT MANUFACTURING COMPANY, Plaintiff, vs. JAMES H. HANCOCK, Defendant.

MR. JUSTICE HANCOCK DELIVERED THE VERDICT OF THE COURT.

By this appeal it is sought to reverse a judgment for \$225.75 entered in favor of appellee, plaintiff below, in an action for a balance due on account of commissions. During the year 1915, defendant was engaged in

the manufacture and sale of certain machinery used for bottle washing and filling purposes. In October of the said year, plaintiff induced the defendant to agree in the manufacture and sale of certain bottle washing machines, and at the same time an oral agreement was entered into between the parties, by the terms of which plaintiff was employed as sole agent for the sale of both of said mentioned machines. Pursuant thereto, plaintiff obtained numerous orders for said machines which were accordingly shipped to the purchasers by the defendant. The orders procured by plaintiff were in writing and contained an express guaranty that the machines would give satisfaction to the purchaser. Subsequently it developed that a number of the buying machines so shipped proved unsatisfactory and were either returned by the purchasers or were retained after the defendant had made certain alterations in their construction or a suitable allowance in price. In all cases

where such expenditures were incurred or allowances made by defendant, plaintiff's commissions in those sales were reduced proportionately. These latter items of commission aggregated \$178.75.

It is urged by defendant, that under the agreement with plaintiff he was to receive no commissions on orders taken, until the customers had paid for the machines.

Two witnesses testified on behalf of the defendant as to the terms of plaintiff's contract of employment. The witness Pohlman, who was president of the defendant company and who made the agreement with plaintiff, testified that plaintiff was to be paid a certain percentage on the net cash received by defendant from the customers on the said orders. The witness Kisser, who was secretary of the defendant company testified that plaintiff's commissions were to be paid when the defendant received its money from the purchaser.

The witness Hebel, who was chief clerk for the defendant and under whose supervision the books of the company were kept, testified that at the request of plaintiff he made up a list of all orders for machines taken by plaintiff, including those where the machines had been returned; that upon receipt thereof plaintiff made up a statement in his own handwriting of commissions alleged to be due him, wherein he listed orders obtained by him, the amounts paid thereon by the purchasers, omitting, however, the orders on which the goods had been returned. There was also a stipulation between the parties at the time of the trial, that plaintiff was not seeking to recover certain items of commission where the machines had been returned.

Plaintiff's case rested entirely upon his own testimony, which was to the effect that he was entitled to

where such expenditures were incurred or otherwise made by defendant, plaintiff's commission in these cases were returned proportionately. These latter items of commission

return were returned.

It is urged by defendant, that under the agreement with plaintiff he was to receive no commission on orders taken, until the statements had been for the return.

The witness testified on behalf of the defendant as to the terms of plaintiff's contract of employment. The witness Polman, who was present at the defendant company

and was with the defendant from plaintiff's testimony, testified that plaintiff was to be paid a certain percentage on the net cash received by defendant from the orders on the said return.

The witness stated, who was secretary of the defendant company testified that plaintiff's commission was to be paid when the defendant received the money from the purchaser.

The witness Habel, who was chief clerk for the

defendant and under whose supervision the books of the company were kept, testified that at the request of plaintiff he made up a list of all orders for machines taken by plaintiff, including those where the machines had been returned; that these orders were placed with the

defendant in his own handwriting of commission assigned to be paid him, except in those cases where he was, however, amounts paid thereon by the purchaser, plaintiff, however, the orders on which the goods had been returned. These

was also a distinction between the orders at the time of the trial, that plaintiff was not seeking to recover certain items of commission from the defendant but from plaintiff.

Plaintiff's case rested entirely on the testimony of the witness Habel.

a commission on all orders taken. However, this testimony is refuted by his own acts. The statement made in plaintiff's handwriting already referred to, wherein he omitted the orders on which the goods had been returned unpaid for, tends strongly to show that at that time plaintiff did not believe that he was entitled to these commissions and that he therefore made no claim for them. And this applies with equal force to the stipulation made at the time of the trial, whereby plaintiff admitted that he was not seeking commissions on several orders where the machines had been returned. Furthermore, plaintiff's testimony on cross examination was of such a character as to leave the mind in great doubt as to whether his version of the contract of employment was correct or not. In such a situation, we are impelled to the conclusion that under the terms of the contract in question plaintiff was not entitled to commissions on orders for machines returned.

Belden v. Innis, 84 Ill. 78.

As to the remaining items hereinabove referred to, we are of the opinion that they were properly allowed. These items, which aggregated \$178.75, represented balances due on commissions earned on orders where the purchasers retained and paid for the machines, after the defendant had made certain alterations therein or reductions in the prices. There is no evidence in the record tending to show that plaintiff agreed to any modification of his contract because of such voluntary concessions made by the defendant.

Accordingly the judgment of the municipal court will be reversed and judgment entered here for plaintiff in the sum of \$178.75.

REVERSED AND JUDGMENT HERE.

a commission on all orders taken. However, this testimony is related by his own wife. The statement made in plaintiff's memorandum already referred to, wherein he testified the orders on which the goods had been returned unpaid for, tends strongly to show that at that time plaintiff did not believe that he was entitled to these commissions and that he therefore made no claim for them. And this was at the actual time of the litigation made at the time of the trial, whereby plaintiff admitted that he was not seeking commissions on several orders where the machines had been returned. Furthermore, plaintiff's testimony on exact commission was of such a character as to leave the mind in great doubt as to whether his version of the contract of assignment was correct or not. In such a situation, he was inclined to the conclusion that under the terms of the contract in question plaintiff was not entitled to commissions on orders for machines returned.

Bellevue v. Jones, 84 Ill. 78.

As to the remaining items hereinabove referred to, we are of the opinion that they were properly allowed. These items, which aggregated \$178.75, represented balances due on commissions earned on orders where the machines returned and paid for the machines, after the defendant had made certain alterations therein or reductions in the prices. There is no evidence in the record tending to show that plaintiff agreed to any modification of his contract because of such voluntary alterations made by the defendant.

Accordingly the judgment of the municipal court for plaintiff will be reversed and judgment entered here in the sum of \$178.75.

D. H. BUXTON et al.,
Appellees,

vs.

BLISS & LAUGHLIN, a corporation,
Appellant.

210 I.A. 247

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for \$2355.85, for the alleged breach by defendant of two certain contracts hereinafter referred to.

The first contract bore date June 28, 1915, and by the terms thereof plaintiffs purchased from defendant a quantity of steel shafting in accordance with specifications to be furnished by plaintiffs. It also contained the following provision, which is pertinent to the question presented by this appeal:

"Specifications for less than carload lots can be made prior to December 31, 1915. * * * It is understood and agreed that the buyer shall specify in ample time to permit the seller to make and ship material during the life of the contract."

The second contract bore date November 1, 1915, and was identical with the first, except as to the price of material and the following provision:

"Specifications for less than carload lots can be made prior to April 1, 1916. * * * But orders for carload lots are to be specified prior to March 1, 1916."

Both contracts provided that shipments must be paid for within thirty days from the date thereof.

On December 30, 1915, plaintiffs placed an order with defendant for a quantity of steel shafting less than a carload, which order the defendant declined to fill under

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DATE OF DEATH . . .

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RECEIVED 15 MARCH 1997; ACCEPTED 15 JULY 1997

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the first contract. It is insisted by defendant, that under the provisions thereof it was not required to fill the said order of December 30, 1915, because it was received too late to be filled during the life of the said first contract.

The contract in question contained no express provision terminating it on a day certain. The provision requiring the purchaser to specify his requirements in ample time to permit the seller to make and ship the material during the life of the contract was a general one and did not supersede or nullify the express provision that specifications for less than carload lots could be made prior to December 31, 1915. In such a situation the express provision must prevail. It follows, therefore, that defendant in refusing to fill said order committed a breach of its contract of June 28, 1915. The damages resulting to plaintiffs from this breach are shown by the record to amount to \$226.64.

The next question presented for determination is, whether or not plaintiffs were in a position to recover damages for the breach by defendant of the second contract dated November 1, 1915.

After January 1, 1916, shipments were made by the defendant to the plaintiffs under the second contract, which, however, were not paid for in accordance with the terms thereof. On March 11, 1916, defendant wrote plaintiff as follows:

"We beg to call your attention to the fact that you are not taking care of your account in accordance with the contract, which specifies terms of payment to be within thirty days. The January account is still unpaid, also a portion of the February account is due. Please give this your attention and oblige."

to which plaintiffs replied on March 14th, enclosing a check to cover the January account and also additional orders for

The first contract. It is amended by the second contract. The provisions thereof it was not required to file the first contract of December 22, 1915, because it was amended by the first contract.

It is further stated that the first contract was amended by the second contract.

The contract in question contained no express provision for the payment of interest on the principal.

It is further stated that the contract provided for the payment of interest on the principal.

The contract provided for the payment of interest on the principal.

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It is further stated that the contract provided for the payment of interest on the principal.

The contract provided for the payment of interest on the principal.

material, but making no mention of the amount due on the February account. On March 17, 1916, defendant returned the unfilled orders, stating that plaintiffs' method of making settlement was unsatisfactory and not in accordance with the contract in question, and that it had therefore decided to cancel same forthwith.

It is conceded that at this time a portion of the February account referred to in defendant's letter of March 11 was due and unpaid. During the months of April and May, 1916, defendant frequently requested plaintiffs in writing to remit the balance due, amounting to \$182.88, which plaintiffs apparently ignored. At the time of the institution of this suit the said balance was still unpaid. Defendant contends that plaintiffs thereby precluded themselves from maintaining an action for the breach of said contract.

It appears from plaintiffs' letter of March 20, 1916, in which it requested that the defendant continue shipments, that plaintiffs had elected to keep the said contract alive for the benefit of both parties. It was therefore incumbent upon them to perform their part of the contract by making payments as they became due thereunder. Having failed to do so, their position is no better than that of the defendant. Chicago Washed Coal Co. v. Whitsett, 276 Ill. 623.

Plaintiffs argue further, that by accepting payments from them from time to time when they were past due, defendant waived the provision in the contract requiring that shipments be paid for within thirty days from date thereof. Without conceding the correctness of this contention as to the first contract (Glen Ridge Coal Co. v. Marion County Coal Co., 205 Ill. App. 264) it is sufficient to say that as to the second contract there is no evidence of any conduct even tending to show a waiver of the aforesaid provision.

material, and making no mention of the amount due on the February account. On March 21, 1931, defendant returned

the unpaid order, stating that plaintiff's account of selling defendant was unsatisfactory and not to be considered with the account in question, and that if the defendant

desired to make good the order,

it is absolutely vital at this time a portion of the

February account be paid. It is defendant's failure to pay, it was due and unpaid. During the month of April and May,

1931, defendant frequently requested plaintiff to return to him the balance due, amounting to \$138.00, when plaintiff

consistently refused. At the time of the incident of this

and the balance was still unpaid. Defendant commands

that plaintiff's money should be returned from defendant

on return for the return of said account.

It appears from plaintiff's letter of March 20,

1931, that plaintiff is aware of the fact that

defendant, who plaintiff has stated to keep the said

order alive for the benefit of both parties. If the

two hundred and thirty dollars of the

order is not paid, the order is not valid. Plaintiff

states to the fact that the order is not valid if the

defendant. Plaintiff states that the order is not valid

if the order is not paid. Plaintiff states that the

order is not valid if the order is not paid. Plaintiff

states that the order is not valid if the order is not

paid. Plaintiff states that the order is not valid if

the order is not paid. Plaintiff states that the order

is not valid if the order is not paid. Plaintiff

states that the order is not valid if the order is not

paid. Plaintiff states that the order is not valid if

We conclude that plaintiffs are entitled to recover the sum of \$43.76, this being the difference between \$286.64, the amount of the damages sustained by plaintiffs for the breach by defendant of the first contract, and \$182.88, the amount due defendant for shipments made under the second contract. Accordingly the judgment of the municipal court will be reversed and judgment entered here for the plaintiffs in the sum of \$43.76.

REVERSED AND JUDGMENT HERE.

It is concluded that the results are similar to those
cover the sum of \$41.75, this being the difference between
\$125.04, the amount of the sum insured by the policy
for the period of 12 months up to the first contract, and
\$83.29, the amount for the period of 12 months up to the
second contract. Accordingly the balance of the
uninsured sum will be reversed and payment entered there
for the balance to the sum of \$41.75.
REVEREND AND TRUSTEES.

309 - 23276

FINDING OF FACTS.

We find the following facts:

1. That the plaintiffs failed and refused to pay for certain material shipped to and received by them under the contract of November 1, 1915, within the time therein expressly provided although requested to do so by the defendant.
2. That the defendant did not waive its right to require payment for such material within the time specified in said contract.

CONFIDENTIAL

CONFIDENTIAL

Re: The following letter:

1. That the Director's letter of 10/10/50, in which he requested that the Bureau be kept advised of any further information received by the Bureau regarding the activities of the "Red" in the United States, is being referred to the Bureau for its consideration.
2. That the Bureau is not aware of any information received by the Bureau regarding the activities of the "Red" in the United States.

325 - 23291

CHARLES D. ENSIGN, trading
as C. B. Ensign & Co.,
Appellant,

vs.

WILLIAM J. LEAHY, Jr.,
Appellee.

3766
210 I.A. 249

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was an action to recover a balance due on a certain promissory note. The court found the issues for the defendant and from the judgment entered thereon plaintiff has prosecuted this appeal.

The note in question dated September 27, 1913, was for the sum of \$75.00, signed by the defendant, Leahy, as maker, payable to the order of the Interstate Commerce and Traffic Service, \$10.00 on October 3, 1913, and \$5.00 on the first day of each month thereafter until fully paid, and was indorsed in blank by the payee.

Plaintiff testified that he purchased the said note from the payee, together with a number of others, in the regular course of business, for value, before maturity, and without notice of any equities in favor of the maker; that thereafter defendant made several payments to him at his office; and that the balance due on said note was \$50.00.

Defendant sought to show that the note in question was at the time of its execution a part of a contract which recited the consideration for which the note was given; that thereafter the note which was at the bottom of the sheet, was

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severed therefrom and transferred to the plaintiff; that said contract was never carried out by the Interstate Commerce and Traffic Service, and that hence the consideration therefor failed. It appears from the evidence that the instrument referred to by defendant, of which he claimed this note was a part, was merely an outline of a course of studies to be pursued and did not purport to be a contract, as contended by defendant in the court below.

Plaintiff's testimony to the effect that he was an innocent holder for value of the said note was undisputed. There is no evidence that defendant was deceived in executing the said note. This is manifest from the fact that he continued to make payments thereon to the plaintiff at the latter's office, where he admittedly saw the note in the form sued upon, with the said payments indorsed on the back thereof. In our opinion, therefore, the court clearly erred in finding the issues for the defendant and entering judgment thereon. The judgment of the Municipal Court will therefore be reversed and judgment entered here for plaintiff in the sum of \$50.00.

REVERSED AND JUDGMENT HERE.

covered therefrom and transferred to the plaintiff; that
said contract was never carried out by the defendants
Lawrence and Thelma Lewis, and that because the plaintiff
was not a party to said contract, it cannot be enforced
against the defendants. In fact the instrument referred to by defendant, of which he
claimed this note was a part, was merely an outline of a
course of studies to be pursued and did not purport to be
a contract, as contended by defendant in the words below.
Plaintiff's testimony to the effect that he was
an innocent holder for value of the said note was unde-
nied. There is no evidence that defendant was deceived
in accepting the said note. This is manifest from the
fact that he continued to make payments thereon to the
plaintiff at the latter's office, where he admittedly saw
the note in the first week upon, with the said payments
indicated on the back thereof. In our opinion, therefore,
the court clearly erred in finding the answer for the
defendant and ordered judgment against the plaintiff.
of the said judgment with interest be reversed and
judgment entered here for plaintiff in the sum of \$50.00.

348 - 23314

MRS. CHARLES ROCKSTROCH,

Appellee, 210 I.A. 250

vs.

CALUMET & SOUTH CHICAGO RAILWAY
COMPANY and CHICAGO CITY RAILWAY
COMPANY,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for \$450.00 in favor of the plaintiff (appellee), in an action for personal injuries sustained while a passenger on a car operated by the defendant.

The negligence charged in the statement of claim was that while plaintiff was in the act of alighting from defendant's car, which was then standing still, and while in the exercise of due care for her own safety, the said car was started with a sudden jerk, precipitating the plaintiff to the ground, causing the injuries complained of.

Plaintiff testified that she was riding in one of defendants' cars, which was proceeding in a southerly direction in Ewing avenue; that after it had passed 104th street she gave a signal to stop; that when the car stopped at the 105th street intersection, she stepped onto the rear platform and took hold of the handrail with her left hand; that just as she was about to alight from the car with her right foot, it started with a lurch, whereupon she became unconscious and knew nothing thereafter until four days later. Two other witnesses - one Thorn and one Aiken, the latter being a police officer - testifying on behalf of the plaintiff, stated that

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CONFIDENTIAL

By this report it is stated that the information was obtained from the source who provided the information to the Bureau of the FBI.

The information was obtained from the source who provided the information to the Bureau of the FBI.

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The information was obtained from the source who provided the information to the Bureau of the FBI.

the plaintiff was found lying on the street, some distance south of 105th street, near the middle of the block. The witness Thorn testified that he helped pick plaintiff up and carry her into a shoe repair shop which was just opposite the place where plaintiff was found; that he did not know whether at that time plaintiff was conscious or whether she had any blood or abrasions on her head or face; that the block from 105th to 106th street was an ordinary one. The witness Aiken testified that he saw defendant's car stop near 106th street and noticed the motorman and conductor get off and run back; that just north of the middle of the block he saw plaintiff lying on the street; that they picked her up and helped her into a shoe repair shop near the middle of the block.

Three witnesses testified on behalf of the defendant, viz., Tolf, the conductor of the car on which plaintiff was injured, one Heinen and one Dust. Tolf, who at the time of the trial was no longer in the employ of the defendant company, testified that when the car was between 105th and 106th streets, plaintiff stepped out on the rear platform and stepped right off into the street, after he had told her to wait until the car stopped. Heinen testified that he came out of a store near the middle of the block and was walking north on the west side of Ewing avenue, toward 105th street, when he noticed plaintiff fall from the street car, which he stated was in motion when she stepped off. Dust, who lived on the west side of Ewing avenue in the immediate vicinity of the accident, testified that he was in his house, and on hearing the car stop, looked out the window and saw plaintiff being picked up right in the middle of the block and carried into the shoe repair shop referred to.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very long letter, and it contains a great deal of information about the state of the country at that time. It is a very important document, and it is one of the most interesting documents in the collection.

1964-1965

1. The following information was obtained from the files of the FBI, New York Office, dated 10/10/61:

It will be noted that the verdict is based upon plaintiff's unsupported testimony that she was injured by the sudden starting of the said car while attempting to alight therefrom at the 105th street intersection. It is undisputed, however, that plaintiff was picked up somewhere in the middle of the block, considerably south of the place where she claimed to have fallen from the car. There is no evidence in the record indicating that she had been dragged from the 105th street intersection to the middle of the next block, and the fact that plaintiff testified that she suddenly lapsed into unconsciousness while in the act of alighting from the car would be inconsistent with such theory. In the light of this evidence and the undisputed fact that plaintiff was picked up in the middle of the block, we are of the opinion that plaintiff stepped from the car at that point, while it was in motion, as a result of which she was injured. From a careful examination of all the evidence, we cannot escape the conclusion that plaintiff's unsupported testimony wholly fails to sustain the verdict. Although a judgment resting upon the testimony of the plaintiff is against contradictory evidence on behalf of the defendant may be properly sustained in some circumstances, yet in the case at bar not only is the plaintiff's testimony very meagre and vague as to the manner in which the accident occurred, but the undisputed evidence completely discredits her testimony on the material issues. (Peaslee v. Glass, 61 Ill. 94; Belden v. Innis, 84 Ill. 78.) We conclude therefore that the verdict is clearly and manifestly against the weight of the evidence and that the judgment must be reversed.

REVERSED.

348 - 23314

FINDING OF FACTS:

This court finds as a fact that appellee alighted from the said street car in the middle of the block between 105th and 106th streets while the said car was in motion, and was thereby guilty of contributory negligence.

10000 - 10000

REMARKS ON THE

This report shows that the results of the
from the first series are in the range of the second series
10000 and 10000 are the same as the first series.
and the results of the first series are the same as the second series.

ANDRA HUBER,
Appellee,

vs.

INTERNATIONAL HARVESTER
CORPORATION,
Appellant.

210 I.A. 251

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant, from a judgment for \$1,000.00, in an action for personal injuries sustained by plaintiff while in the employ of the defendant.

The cause of action was predicated upon a violation by defendant of sec. 1 of "An Act to provide for the health, safety and comfort of employes," etc., ch. 48, R. S. of Illinois, in failing to guard a certain window in its wagon factory near which plaintiff was employed, as a result of which he fell out and was injured.

The factory building in question was about 100 feet long and 50 feet wide, and contained numerous windows. The window out of which plaintiff fell was in the second story of the building, about eighteen feet above the ground level. The sill of the said window was about 30 inches above the floor. A rivet bin about eighteen inches wide and about twelve feet long extended across the full width of the window, and the top of it was on a level with the sill. The machine upon which plaintiff was employed at or just prior to the time of the accident, was located immediately in front of and about four or five feet from the said window. While operating the said machine, plaintiff's back was turned toward the window, and it is plaintiff's contention that he fell out of the window while placing

100 - 10100

Appellee, ...

Appellant, ...

vs.

Appellee, ...

MR. JUSTICE ROBERTS delivered the opinion of the court:

This is an appeal by the defendant, from a

judgment for \$5,000.00, in an action for personal injuries sustained by plaintiff while in the employ of the defendant.

The cause of action was predicated upon a

violation by defendant of sec. 1 of "An Act to provide for the health, safety and comfort of employees," etc., ch. 48,

P. S. of Illinois, in failing to guard a certain window in its wagon factory near which plaintiff was employed, as a result of which he fell out and was injured.

The factory building in question was about 100

feet long and 20 feet wide, and contained numerous windows.

The window out of which plaintiff fell was in the second story of the building, about eighteen feet above the ground.

Level. The sill of the said window was about 24 inches

above the floor. A rivet six inches from the sill

and about twelve feet long extended across the full width

of the window, and the top of it was on a level with the

sill. The machine upon which plaintiff was employed at or

just prior to the time of the accident, was located immediately

in front of and about four or five feet from the said

window. While operating the said machine, plaintiff's

head was turned toward the window, and it is plaintiff's

a wagon wheel on the table of his machine.

Defendant contends; (1) that the verdict is clearly and manifestly against the weight of the evidence, and (2) that the statute in question had no application to the facts in the case at bar.

Plaintiff, who was the only witness in his own behalf as to the manner in which the accident occurred, testified as follows:

"I don't know now whether I got it (the wheel) onto the table or not. I don't know what became of the wheel either. I don't know how I happened to fall out of the window just at that time, except that I lifted it and I was in the act of putting it on the machine, and I don't know what happened. I don't know anything about whether I slipped or not. All I know is that I was trying to lift the wheel and all at once I fell out of the window."

On behalf of the defendant, the witness Larson, an assistant foreman, testified that as he was passing the place of the accident on the morning in question, he saw plaintiff go over and raise the window back of his machine; that when the witness opened the door of his office he saw plaintiff's shadow through the glass door; that he went back and looked out the window and saw plaintiff on the sidewalk below. The witness Meder, a wheel inspector employed by the defendant, testified that he was present at the time of the accident and saw plaintiff fall out of the window; that he "saw only that he was with one foot on the box and he fell right out." The witness Evans, cashier and investigator for the defendant, testified that he met plaintiff at the doctor's office shortly after the accident and inquired how it occurred; that plaintiff informed the witness that he felt faint that morning and went over toward the window for fresh air, and fell out. This testimony was not contradicted, although plaintiff denied that on the occasion in question he felt faint and fell out the window

to the ground on the side of the building.

On the morning of the 11th, the weather was

clear and the wind was light and variable.

On the 12th, the weather was clear and the wind

was light and variable.

On the 13th, the weather was clear and the wind

was light and variable.

On the 14th, the weather was clear and the wind

was light and variable.

On the 15th, the weather was clear and the wind

was light and variable.

On the 16th, the weather was clear and the wind

was light and variable.

On the 17th, the weather was clear and the wind

was light and variable.

On the 18th, the weather was clear and the wind

was light and variable.

On the 19th, the weather was clear and the wind

was light and variable.

On the 20th, the weather was clear and the wind

was light and variable.

On the 21st, the weather was clear and the wind

was light and variable.

On the 22nd, the weather was clear and the wind

was light and variable.

On the 23rd, the weather was clear and the wind

was light and variable.

On the 24th, the weather was clear and the wind

was light and variable.

On the 25th, the weather was clear and the wind

was light and variable.

On the 26th, the weather was clear and the wind

was light and variable.

On the 27th, the weather was clear and the wind

was light and variable.

On the 28th, the weather was clear and the wind

was light and variable.

On the 29th, the weather was clear and the wind

was light and variable.

On the 30th, the weather was clear and the wind

while seeking fresh air.

Plaintiff's testimony as to the manner in which the accident occurred is not only vague and indefinite, but when viewed in the light of the surrounding circumstances, is incredible. It is admitted that the window sill in question was twelve inches wide and that a rivet bin eighteen inches wide was located immediately in front thereof on a level with the sill, which the plaintiff testified was "hip high." It is inconceivable, therefore, that plaintiff could have fallen over the rivet bin, the sill and out of the window while in the act of lifting a wheel on a table which was four or five feet away from the window. From a careful examination of the entire record, we are impelled to the conclusion that the verdict is clearly and manifestly against the weight of the evidence.

As to the second point raised by defendant, we are of the opinion that under the circumstances, the defendant was not required to guard the said window, and hence its failure to do so did not constitute a violation of the act in question.

Accordingly the judgment will be reversed.

REVERSED.

while reading these air.

Minister's testimony as to the manner in which the section occurred in not only vague and indefinite, but when viewed in the light of the surrounding circumstances,

it is evident that the witness still in position

was twelve inches wide and three - five and six inches wide was located himself in front of the window on a level with the sill, which was placed at least two feet from the window.

It is inadvisable, however, to place him in front of the window while in the act of firing a shot in a room which was four or five feet away from the window. From a careful examination of the entire record, we are inclined to the conclusion that the witness is clearly and manifestly against the weight of the

evidence.

In so the second point raised by the witness, we are of the opinion that under the circumstances, the defendant was not required to guard the said window, and hence the failure to do so did not constitute a violation of the act

is question.

Accordingly the judgment will be reversed.

REVEREND

155 - 23498

FINDING OF FACTS.

This court finds as a fact that the plaintiff did not fall out of the window in question while engaged in discharging the duties of his employment; and that the said window was not a dangerous place, within the meaning of the statute hereinabove referred to and hence the defendant was not required to guard the same.

(Title of Book)

This book deals with the history of the United States from the time of the first settlement in 1607 to the present. It covers the early years of the colony, the struggle for independence, the formation of the Constitution, and the growth of the nation to the present day. The book is written in a clear and concise style, and is suitable for use in schools and colleges. It is a valuable source of information for anyone interested in the history of the United States.

210 I.A. 253

CARL CHRISTIANSON,
Appellee,

vs.

EDWARD J. DEVINE,
Appellant.

APPEAL FROM COUNTY
COURT, COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$160.00, entered upon the verdict of a jury in an action brought by plaintiff, for damages sustained in a collision with defendant's automobile.

Halsted street runs north and south and intersects Marquette boulevard, which runs east and west. Plaintiff was driving his automobile north in Halsted ^{street} behind a street car, while defendant was driving his automobile east in Marquette boulevard. It appeared from the evidence that the said street car stopped on the near side, i. e. the south side, of Marquette boulevard, to discharge passengers. Plaintiff testified that he stopped his automobile about five feet behind the said street car, while there was testimony on behalf of the defendant that plaintiff's automobile did not come to a stop at the said intersection but proceeded to pass the said street car on the right, while standing. As plaintiff's automobile was crossing Marquette boulevard it collided with defendant's automobile, which was then crossing Halsted street in front of the said northbound street car, which the evidence shows had also started to cross Marquette boulevard but was stopped to let defendant's automobile pass, after having proceeded a short distance. While passing in front of the said street car, defendant's

automobile veered slightly to the north, the collision taking place near the northeast corner of the said intersection.

Defendant offered in evidence sec. 2484a of the municipal ordinances of Chicago, which prohibited vehicles from passing or approaching within ten feet of a street car stopped for the purpose of discharging or taking on passengers. To the introduction thereof counsel objected, on the ground that the said ordinance was not germane to the issues, whereupon it was excluded by the court.

It is argued by defendant that the speed of plaintiff's automobile at and just prior to the time of the collision had an important bearing on the question whether or not plaintiff was in the exercise of due care in operating his automobile at the time and place in question; that if plaintiff had stopped his automobile ten feet behind the said street car, as required by the said ordinance, the collision might have been averted; that his failure to do so was a violation of the said ordinance and proof thereof would constitute prima facie evidence of plaintiff's negligence.

Although there was a conflict in the evidence on the question whether or not plaintiff's automobile came to a stop upon overtaking the said street car at Marquette boulevard, yet defendant was entitled to the benefit of this ordinance in connection with the testimony adduced on his behalf, and it was then for the jury to determine whether or not plaintiff violated the said ordinance, and if so, whether or not such violation was the proximate cause of the accident. The court therefore erred in excluding the said ordinance.

Plaintiff makes the point that no proper foundation

automobile veered slightly to the north, the collision
taking place near the northwest corner of the said inter-
section.

Defendant offered in evidence the following
municipal ordinances of Chicago, which prohibited vehicles
from passing or expediting within ten feet of a street
car stopped for the purpose of discharging or taking on
passengers. To the instruction thereto counsel objected,
on the ground that the said ordinance was not germane to
the issues, whereas it was excluded by the court.

It is argued by defendant that the speed of
plaintiff's automobile at and just prior to the time of the
collision had an important bearing on the question whether
or not plaintiff was in the exercise of due care in operating
his automobile at the time and place in question; that if
plaintiff had stopped his automobile ten feet behind the
said street car, as required by the said ordinance, the
collision might have been averted; that his failure to do
so was a violation of the said ordinance and proof thereof
would constitute prima facie evidence of plaintiff's negli-
gence.

Although there was a conflict in the evidence on
the question whether or not plaintiff's automobile came to
a stop upon overtaking the said street car at Washington
boulevard, yet defendant was entitled to the benefit of this
evidence in connection with the testimony adduced on his
behalf, and it was then for the jury to determine whether or
not plaintiff violated the said ordinance, and if so, whether
or not such violation was the proximate cause of the accident.
The court therefore erred in excluding the said ordinance.
Plaintiff makes the point that no proper foundation

had been laid for the introduction of the said ordinance, for which reason alone it was properly excluded. Such point cannot be made here, in the absence of a specific objection to that effect in the court below. The purpose of a specific objection in such case is to enable the other party to meet it. C. & N. W. Ry. Co. v. Ratheneau, 225 Ill. 283; I. C. R. R. Co. v. Wade, 206 Ill. 523.

Plaintiff also argues that defendant is precluded from questioning the judgment because he failed to except to the action of the trial court in overruling his motions for a new trial and in arrest of judgment, and in entering the judgment. Sec. 81 of the Practice act dispenses with the necessity of excepting to all adverse rulings of the trial court. Miller v. Anderson, 269 Ill. 608.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

and been laid for the introduction of the new evidence,
for which reason alone it was properly excluded. (upon point)
cannot be made here; in the absence of a specific objection
to that effect in the court below. The purpose of a
specific objection in such case is to enable the other
party to meet it. I. E. I. v. I. E. I. v. I. E. I.
111. 225; I. E. I. v. I. E. I. 208 III. 227.
The purpose of such a point is to prevent
from questioning the judgment because it failed to comply
to the action of the trial court in overruling the motion
for a new trial and in award of costs, and in entering
the judgment. See. 21 of the Practice and Procedure with
the necessity of answering to all charges unless of the
trial court. Miller v. Miller, 111 Ill. 227.
For the reasons heretofore assigned, the judg-
ment will be reversed and the cause remanded.
REVERSED AND REMANDED.

1 - 22577

BESSIE ZURASKY, a minor, by
JOHN ZURASKY, her father and
next friend,
Defendant in Error,

vs.

HANDYCAP COMPANY, a corporation,
Plaintiff in Error.

210 I.A. 254

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a writ of error brought by the defendant below to review a judgment in favor of the plaintiff entered by the Municipal Court of Chicago on the verdict of a jury in an action of tort for personal injuries.

Plaintiff, defendant in error here, was a minor over fourteen and under sixteen years of age. She was employed by defendant and was injured while working in its factory. She brought suit for damages sustained by her, relying on Par. 20-J of the Child Labor Act, Hurd's Revised Statutes 1916, p. 1239, which provides that no child under the age of Sixteen years shall be employed at certain kinds of hazardous work named in the statute.

It is admitted that the work which plaintiff was doing under the direction of the defendant was of a kind prohibited.

The defendant was operating under the Workmen's Compensation Act, Hurd's Revised Statutes 1916, p. 1274, and claims that by reason of Par. 2 of Sec. 5 thereof, plaintiff's exclusive remedy was under the Compensation Act and that a suit at law would, therefore, not lie to recover damages for the injuries sustained.

Pending this suit the precise question has been

21014.24

RECEIVED BY
THE DIRECTOR
OF THE BUREAU OF
IMMIGRATION AND
NATURALIZATION

This is a copy of a letter from the Bureau of Immigration and Naturalization to the Department of State, dated January 10, 1934, regarding the application of [Name] for admission to the United States.

The applicant is a male, born [Date], [Place], [Country]. He is currently residing at [Address]. He has been employed by [Company] since [Date]. He has no criminal record and is not a member of any subversive organization. He is a native-born American citizen.

It is recommended that the application be approved and the applicant be admitted to the United States.

The following information was obtained from the Bureau of Immigration and Naturalization records: [Name] was born on [Date] at [Place], [Country]. He is a native-born American citizen. He has been employed by [Company] since [Date]. He has no criminal record and is not a member of any subversive organization. He is a native-born American citizen.

decided by the Supreme Court of this state in the case of Roszek v. Bauerle & Stark Co., 282 Ill. 557, and the decision is adverse to the contention of plaintiff in error. We are bound to follow that decision.

It is also assigned for error that the damages are excessive. The thumb of plaintiff's right hand was crushed by reason of the accident and she lost approximately half of the first phalange of it. She was under the doctor's care from May 4 until May 29.

She testifies that her hand and arm were swollen for about a month and that she did not work until the following October. The pain was severe at the time of the injury and continued until the time of the trial. The hand is disfigured and its use to some extent impaired.

The judgment which is for \$750.00 is large but not so excessive as to require a reversal. The judgment will therefore be affirmed.

AFFIRMED.

decided by the Supreme Court of this state in the case of

Rosen v. Rosen, 202 Ill. 2d, 193, and the

decision is reversed to the extent of clarity in error.

We are bound to follow that decision.

It is also pointed out that the evidence

was excessive. The amount of damages awarded was

excessive by reason of the evidence and was not

fair to the state of Illinois. The law under the doctrine

of error is reversed.

The evidence that her husband was not

for about a month and that she was not until the

following October. This is not correct at the time of the

injury and conviction until the time of the trial. The court

is distinguished and is not to be taken into account.

The judgment which is for \$100,000 is affirmed.

not so executed as to require a reversal. The judgment

is reversed in part.

Reversed.

WILDER P. POWERS,
Appellant,

vs.

JAMES T. JARRELL et al.,
PULASKI LUMBER COMPANY, JOHN
A. WICKUM, THOMAS F. KELLY, M.
STANGARONE, THOMAS C. NAYLOR
and A. SLEVIN, doing business as
KEDZIE FIXTURE COMPANY and AMERICAN
HEATING AND PLUMBING CORPORATION,
Appellees.

210 I.A. 256

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from a decree of foreclosure by which certain claims for mechanics' liens are held to be superior to the lien of the trust deed foreclosed.

On September 2, 1914, appellant Wilder P. Bowers was the owner of certain premises situated in the city of Chicago, Cook County, Illinois, described as lots 13 and 14, ^{Block 1,} in J. M. Jones' Subdivision of lots 24 to 28 inclusive, in Elisha W. Hundley's Subdivision of the east half of the South West Quarter of Section 17, Township 40, North Range 14, East of the 3rd Principal Meridian. Lot 14 was registered under the Torrens Law, but lot 13 was not so registered.

Appellee James T. Jarrell negotiated a contract with Bowers to purchase these premises for the sum of \$15,000. It was agreed that \$250.00 of the purchase price should be paid in cash and that Jarrell as purchaser should execute a trust deed to secure the payment of the balance.

It was also agreed that the premises should be improved by the erection of an apartment building thereon and further that the purchaser might negotiate a loan

2101A 338

WILSON F. BOWEN,
Applicant.

WILSON F. BOWEN, of the
County of Cook, State of Illinois,
do hereby certify that the within
copy of the petition of
WILSON F. BOWEN, for
admission to the
Bar of the Court of
Common Pleas of Cook County,
Illinois, is a true and
correct copy of the
original filed in the
Clerk's Office of said
Court, and that the
same has been duly
examined and approved.

WILSON F. BOWEN, Clerk of Court.

This is an appeal by the respondent from a

verdict of the jury in the case of WILSON F. BOWEN, Plaintiff, vs. JAMES T. BOWEN, Defendant, in the County of Cook, State of Illinois, to-wit: that the jury found for the plaintiff and against the defendant.

The petition of the plaintiff is as follows:

That the order of the court in the case of WILSON F. BOWEN, Plaintiff, vs. JAMES T. BOWEN, Defendant, in the County of Cook, State of Illinois, to-wit: that the jury found for the plaintiff and against the defendant, is hereby appealed from.

In the County of Cook, State of Illinois, to-wit: that the jury found for the plaintiff and against the defendant.

That the order of the court in the case of WILSON F. BOWEN, Plaintiff, vs. JAMES T. BOWEN, Defendant, in the County of Cook, State of Illinois, to-wit: that the jury found for the plaintiff and against the defendant, is hereby appealed from.

In the County of Cook, State of Illinois, to-wit: that the jury found for the plaintiff and against the defendant.

That the order of the court in the case of WILSON F. BOWEN, Plaintiff, vs. JAMES T. BOWEN, Defendant, in the County of Cook, State of Illinois, to-wit: that the jury found for the plaintiff and against the defendant, is hereby appealed from.

In the County of Cook, State of Illinois, to-wit: that the jury found for the plaintiff and against the defendant.

That the order of the court in the case of WILSON F. BOWEN, Plaintiff, vs. JAMES T. BOWEN, Defendant, in the County of Cook, State of Illinois, to-wit: that the jury found for the plaintiff and against the defendant, is hereby appealed from.

In the County of Cook, State of Illinois, to-wit: that the jury found for the plaintiff and against the defendant.

That the order of the court in the case of WILSON F. BOWEN, Plaintiff, vs. JAMES T. BOWEN, Defendant, in the County of Cook, State of Illinois, to-wit: that the jury found for the plaintiff and against the defendant, is hereby appealed from.

upon the premises not to exceed 83-1/3% of the value of the proposed improvements and that the trust deed securing this loan should be made a first lien upon the premises.

It was also agreed between Bowers and Jarrell that the amount of this first loan should be \$50,000 and that it should be made through W. H. MacQueen & Co., who agreed that they would see to it that the proceeds of the \$50,000 loan should not be paid to Jarrell until he had made advancements sufficient to take care of all claims of contractors and subcontractors that might imperil the lien of Bowers under the second trust deed to be executed as security to Bowers for the purchase money. To this end Bowers checked over the plans and specifications and consented that the loan should be negotiated through MacQueen & Co. upon their promise that he should be protected in this way and this promise was one of the conditions upon which Bowers consented to the transaction.

Jarrell took possession of the premises and proceeded to let contracts for the building, but the deed and trust deeds were not executed and delivered until November 2, 1914. Prior to the delivery of the deed a bond from Jarrell to Bowers in the sum of \$1500 was executed and delivered, conditioned that the building should be completed free from mechanics' liens.

The lien claimants who are appellees (with exceptions which will be hereafter noted) as their work progressed under their respective contracts, requested payments from Jarrell who in turn requested from MacQueen & Co. that the proceeds of the \$50,000 loan should be applied in making payments, and these requests were denied by MacQueen & Co. until Jarrell produced receipts for payments and

1. The purpose of this report is to provide information on the results of the study and to discuss the implications of the findings for the future of the field.

CLASSIFIED BY 60320 . AUTHORITY: 25 USC 552a

100,000 feet above sea level. The water is very pure and is
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These findings are consistent with the hypothesis that the observed effects are due to the presence of a specific, non-specific, or general factor.

doi:10.1017/S0022292410000507

waivers of lien from the contractors and subcontractors.

For the purpose of showing such payments to the satisfaction of MacQueen & Co., Jarrell obtained from the contractors and subcontractors receipts in various sums indicating payments which had not in fact been made. Jarrell made affidavit that the payments had been made and delivered the affidavit to MacQueen & Co. together with the receipts of the contractors and subcontractors indicating such payment.

The lien claimants at the time of execution and delivery of these receipts knew that they were to be used by Jarrell for the purpose of obtaining the proceeds of the first mortgage loan from MacQueen & Co.

On December 4, 1914, Jarrell furnished MacQueen & Co. his sworn statement showing the names of such contractors and subcontractors and the amount of their contracts and payments due. According to this affidavit the aggregate amount of the contracts was \$51,887, and the amount due and to become due thereon amounted to \$45,267.

Payments were thereupon made by MacQueen & Co. out of the proceeds of the first mortgage loan to the contractors and subcontractors upon Jarrell's orders and they at the same time executed and delivered releases and waivers of lien on account of labor or materials, or both, furnished "or which may be furnished" for the building.

In each case the receipt of the contractor and subcontractor contained a statement of the total amount of the contract, the amount which it was claimed had been paid thereon, the amount of extras, and the balance, if any, which would become due under the contract.

Prior to procuring these receipts and waivers of

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lien from appellees, Jarrell represented to them that their respective receipts should be delivered to MacQueen & Co. to be used as payment only so far as the first mortgage loan made by MacQueen & Co. was concerned. The different waivers of lien were under seal and each recited that it was for \$1.00 and other good and valuable consideration, but the \$1.00 was not in fact paid. None of the lien claimants ever filed any claim for lien, or copy thereof with the Registrar of Titles.

The decree sustaining exceptions to the Master's report found that the lien of appellant Wilder P. Bowers, was subordinate and inferior to that of the lien claimants and that the lien claimants had liens upon both of the lots, notwithstanding their failure to file notice with the Registrar of Titles.

Appellant insists that appellees, who are lien claimants, are bound by their waivers of lien and are estopped by their receipts and the execution and delivery of the waivers of lien, and that the decree of the Circuit Court in so far as it gave the lien claimants priority over the mortgage of appellant is erroneous.

On behalf of the lien claimants it is urged that the waivers of lien, receipts, statements, etc. were executed and delivered without any consideration therefor, and that the lien claimants are not estopped by reason of the execution and delivery of such receipts, statements and waivers.

If the question here arose between the lien claimants and the owner, Jarrell, their contentions would be good, but as between them and appellant a different question is presented.

The evidence shows that the lien claimants knew very

from the applicant, Jansoll represented to them that their
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and as the lien claimants had taken upon both of the lots,
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Applicant advised that he believed, that the lien
claimants, who being by their entries of lien and are engaged
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It is the applicant's contention that the lien claimants
and the entries, Jansoll, their consideration would be good, but as
between them and applicant a different question is presented.

well that the money which they were about to obtain was not being paid by Jarrell, the owner, but by MacQueen & Co. from whom under the terms of their respective contracts, they had no legal right to demand payment. These funds which were held by MacQueen & Co. were trust funds by reason of the agreement between Jarrell, Bowers and MacQueen & Co., and MacQueen & Co. was a trustee of the funds for all parties interested. The payment, therefore, by MacQueen & Co. of the money held by them to the lien claimants, we think constituted a valuable consideration for the execution and delivery of the receipts and waivers of lien.

Moreover, we think the lien claimants are estopped by their receipts and waivers from claiming a lien superior to that of Bowers under the second trust deed. The essential conditions necessary to create an estoppel are stated in Dinet v. Bilert, 13 Ill. App. 99 and People v. Brown et al., 67 Ill. 437.

It is urged that appellant was unknown to the lien claimants and that it would, therefore, be absurd to presume that the waivers of lien were given for the purpose of misleading him, but the waivers of lien were addressed generally "to whom it may concern" and must be held to be a representation to anyone interested in the premises. It is also urged that Bowers did not act upon these waivers; that in fact he personally knew nothing about them, but this view disregards the actual situation which was that Bowers relied upon the trustee of the funds, MacQueen & Co. to protect him and that MacQueen & Co. were his agents in that regard and therefore in acting upon these representations MacQueen in fact acted for Bowers.

Again it is urged that Bowers was not injured be-

well that the money which they were to obtain was not being paid by Jettell, the owner, but by MacQueen & Co. from whom under the terms of their respective contracts, they had no legal claim to the money. These facts were stated by MacQueen & Co. were true and by reason of the agreement between Jettell, Jettell and MacQueen & Co., and MacQueen & Co. was a trustee of the funds for all parties interested. The payment, therefore, by MacQueen & Co. of the money held by them to the lien claimants, was a valid consideration for the execution and delivery of the receipts and waivers of lien.

Moreover, we hold the lien claimants are estopped by their receipts and waivers from obtaining a lien superior to that of Powers under the second trust deed. The general condition necessary to obtain an estoppel are stated in Elmer v. Elmer, 15 Ill. App. 2d 32 and People v. People, 27 Ill. 437.

It is held that the lien was assigned to the lien claimants and that it was, therefore, assigned to persons that the waivers of lien were given for the purpose of releasing them, but the waivers of lien were not given generally "to whom it may concern" and was held to be a representation to anyone interested in the premises. It is also held that Powers did not own those waivers; that he had no personally made them; that they were given to the actual assignee which was that Powers relied upon the release of the fund, because it is a representation and that MacQueen & Co. were his agents in that regard and therefore in setting upon these representations MacQueen & Co. were liable.

cause the liens of appellees were superior to his lien under the second trust deed and if waivers had never been executed, they would have still remained a lien superior until paid. Even if we concede this is true, it would not follow that Bowers was not injured. The effect of the execution and delivery of these receipts and waivers was to mislead him as to the actual situation. He had a legal right to have the funds in MacQueen's hands, held and paid according to the agreement. Through MacQueen's being deceived by these false representations, Bowers was deprived of that legal right. This was injury.

We are of the opinion that the facts show every element of estoppel and that the decree was erroneous in so far as it found the liens of claimants Thomas Naylor, M. Stangarone, Pulaski Lumber Company, Thomas E. Kelly and John A. Wickum to be superior to the lien of appellant under the trust deed which he sought to foreclose. The views herein expressed are we think sustained by the following authorities: The Commercial Loan and Building Assn. v. TREVETTE et al., 160 Ill. 390; Turnes v. Brenckle, 249 Ill. 396; Heidenbluth et al. v. Rudolph, 152 Ill. 316; P. A. Lord Lumber Co. v. Callahan et al., 181 Ill. App. 323.

Appellant has also urged objections to the amounts found due to the respective lienors. Appellee M. Stangarone concedes an error and has entered a remittitur in the sum of \$1574.82 and claims an award of only \$3338.50 instead of \$4963.32. With the exception of this amount which has been remitted, we think the objections made to the respective amounts allowed to the different lien claimants are without merit and that they are entitled to liens for such amount subject however to the lien of appellant's trust deed, with exceptions hereafter noted.

because the liens of appellants were superior to his lien under the second trust deed and if appellee had never been executed, they would have still remained a first mortgage upon the land.

Even if we concede this as true, it would not follow that appellee was not injured. The effect of the execution and delivery of these releases and waivers was to release him as to the second lien. He had a legal right to have the funds in appellee's hands, held and paid according to the agreement. Through appellee's being deceived by these false representations, appellee was deprived of that legal right. This was injury.

We are of the opinion that the facts show every element of fraud and that the second and erroneous in so far as it took the lien of appellee from appellee, is a fraud, illegal and void.

John A. Adams to be executed to the lien of appellee under the trust deed which he sought to foreclose. The views herein expressed are we think sustained by the following authorities:

The Commercial Bank and Building Assn. v. First Nat. Bk., 100 Ill. 330; Adams v. Bankers, 240 Ill. 330; Commonwealth v. Adams, 102 Ill. 330; Adams v. Bankers, 240 Ill. 330; Adams v. Bankers, 240 Ill. 330.

Appellant has also urged objections to the amounts found due to the respective lienors. Appellee N. Thompson concedes an error and has entered a remittitur in the sum of \$1744.00 and claims an award of only \$3300.00 instead of \$3000.00. With the exception of this amount which has been remitted, we think the objections were to the respective amounts allowed to the different lien claimants and without merit and that they are entitled to their full amounts and subject however to the lien of appellee's trust deed, which

A different situation is presented by the record with reference to the lien claims of Abraham Slevin doing business as the Kedzie Fixture Company, and that of the American Heating & Plumbing Corporation. The conditions which have heretofore been set forth and which we have held to constitute an estoppel as to the other lien claimants do not exist as to their claims, and we think they are entitled to recover the respective amounts of \$933.00 and \$1668.40 as claimed by them and that their liens are prior and superior to that of the Howers' trust deed. "A mechanic's lien attaches from the time the contract is made. It attaches to the interest of those who make the contract, and to the interest of all those who authorize or knowingly permit such contract to be made." Hughes v. McCasland, 132 Ill. App. 365; Mechanics' Lien Act, sec. 1.

There remains to consider one important question raised on the record and that is whether any of the claimants are entitled to liens upon lot 14 which was registered under the Torrens Law. No one of the lien claimants complied with the provisions of this law as contained in sections 89, 90 and 92 of the Torrens Act, but it is urged here that the Mechanics' Lien Act as revised and re-enacted and in force July 1, 1903, has operated to repeal those sections by reason of its being a later enactment.

Pending the consideration of this case the second division of this court has filed an opinion in the case of Hecken v. Isenberg et al., No. 23345, holding that the Mechanics' Lien Act did not have the effect of repealing these sections of the Torrens Law. We had in the consideration of this case arrived at the same conclusion for reasons which the opinion there rendered make it unnecessary

A different view, and in substance, is presented

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for us to state.

We are, however, of the opinion that upon the principle laid down in Barbee v. Morris et al., 221 Ill. 382 and Haas Electric Co. v. Amusement Co., 236 Ill. 452, a court of equity will apply the general payments which have been made on account of these claims to the unsecured portion thereof, and therefore that each and all the lien claimants have the right to have their liens enforced to the full amount of the claim allowed as against lot 13 which was not registered under the Torrens Act.

The decree of the Circuit Court will therefore be reversed and the cause remanded with directions to enter a decree in conformity with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

279 - 23245

GIFFORD WOOD COMPANY,
a corporation,
Appellant,

vs.

CHICAGO COATED BOARD COMPANY,
a corporation,
Appellee.

210 I.A. 259

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment of the Municipal Court of Chicago entered by that court upon a finding against the plaintiff and in favor of the defendant upon the defendant's claim of set-off.

Appellant, plaintiff below, is engaged in the business of selling and installing conveyor and elevator machinery and labor saving devices.

The defendant, appellee, is a large manufacturer of paper box board, operating a plant in the city of Chicago, employing about 250 men.

In June, 1913, appellee decided to change the shafting at its factory. This shafting operated the entire machinery of the plant and it was necessary that the plant be closed down while the repairs were being made.

On June 21st the parties entered into a written agreement, wherein appellant for a consideration of \$6538.00 agreed to do the work required, furnish all materials, etc. in accordance with certain specifications and drawings.

The agreement provided, "It is further understood and agreed that all bearings, shaftings, pulleys, and rope

2101 A. 259

UNITED STATES

OF CHICAGO

UNITED STATES OF AMERICA
vs.
UNITED STATES OF AMERICA

UNITED STATES OF AMERICA
vs.
UNITED STATES OF AMERICA

This is an appeal by the plaintiff from a judgment of the United States District Court for the Northern District of Illinois, entered on the 14th day of June, 1934, in favor of the defendant upon the complaint of the plaintiff, and is for the purpose of reversing the judgment of the district court. The plaintiff, herein, is engaged in the business of selling and installing conveyor and elevator machinery and labor saving devices. The defendant, herein, is a large manufacturer of paper box boards, operating a plant in the city of Chicago, employing about 100 men. In June, 1933, the plaintiff decided to change the location of its factory. This change required the removal of the plant and its machinery and it was necessary that the plant be closed down while the repairs were being made. On June 1st the parties entered into a written agreement, wherein the plaintiff for a consideration of \$2500.00 agreed to do the work required, furnish all materials, etc. in accordance with certain specifications and drawings. The agreement provided, in its further understand-

sheaves shall be Dodge Manufacturing Company's products." Appellee was to turn the shafts and working space over to appellant at seven o'clock A. M. Monday morning July 28th, 1913, and appellant agreed to prosecute the work uninterruptedly, with a sufficient force of mechanics and otherwise and to complete the work by or before ten o'clock A. M. Sunday, August 3rd, 1913. The agreement provided that time should be of its essence.

It was also agreed that appellant should not be held responsible for any "loss, damage or delay" caused by accidents or other contingencies beyond its control, and that its responsibility for the condition and delivery of the material should cease upon receiving from the transportation company a receipt for the shipment in good order.

July 25, 1913, the time for shutting down the mill and beginning the work was advanced to 7:30 A. M. July 30, 1913, and the date for completion was extended to 10 A. M. August 10, 1913. This in consideration of \$350.00 to be deducted from the contract price, being the estimated value of the overtime which would thus be saved.

At this time the Dodge Manufacturing Company had notified appellant that by reason of a breakdown it could not deliver the machinery in Chicago before August 2, 1913, but appellant did not inform appellee thereof until July 31st.

The work was not completed by August 10th and on August 14th appellee through its engineers notified appellant that the work must be completed by Monday August 18th, and that unless by 4 o'clock P. M. on that day the engineers could be convinced that this would be done they would take action to insure its completion. On Monday afternoon of

...and is complete but not yet before the court. ... with a sufficient force of evidence and other- ... 1941, and applicant agreed to prosecute the work during- ... applicant at seven o'clock A. M. Monday, July 22nd, ... applicant was to turn the chain and working space over to ... witnesses shall be George Kuntzschewich, company's president."

14 was also agreed that a contract should not be made with a company which is not a member of the Association. It was also agreed that a contract should not be made with a company which is not a member of the Association. It was also agreed that a contract should not be made with a company which is not a member of the Association.

and beginning the work was assigned to V. B. ...
... and the date for completion was estimated at ...
... This is considered as ...
... being from the original price, being the estimated value
... which would have been ...

[illegible]

It was found that the engine was not running at the time of the accident. The engine was started by the driver after the accident and it was found that the engine was running at the time of the investigation.

August 18, appellee took possession of the plant, ordering the workmen of appellant from the premises and completed the work required by the contract.

Appellant sued and set up that it was excused from performing on time by reason of unavoidable delays and other faults of the appellee.

The cause was tried by the court without a jury and propositions of both law and fact were held and refused from which the views of the court both as to the law and the facts may be determined.

The court found the facts as to the making of the contract as above set forth and disallowing other claims of appellant as to delay, further held, however, that the plaintiff, the Gifford Wood Company was delayed eight days in completing the work under the contract in not being able to obtain the shafting from the Dodge Manufacturing Company on account of an accident caused by the breaking down of the engines of the said Dodge Manufacturing Company and that said accident was beyond the control of the Gifford Wood Company or the Dodge Manufacturing Company.

The court further held as to the facts that the plaintiff, the Gifford Wood Company was delayed on account of a car of shafting shipped by the Dodge Manufacturing Company being lost for three days and that the delay was a contingency beyond the control of the Gifford Wood Company.

The findings of fact made by the court are we think sustained by the evidence, but the rulings of the court upon the propositions of law, in our opinion, indicate that an incorrect rule of law was applied to these facts.

The court finds as a matter of fact that there

August 18, entitled such possession of the plant, building

the business of electrical work and the business of electrical

the work required by the contract.

Applicant says that it was required

from possession on time by reason of considerable delay and

other failure of the contract.

The court was told of two cases without a jury

and possession of the plant and the work was said to be

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The court found the facts as to the matter of the

contract as above and that the defendant was in breach of

appellant as to delay, further delay, however, it was the

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on account of an accident caused by the breaking down of the

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said accident was beyond the control of the defendant and

company, as the court determined.

The court further held as to the facts that the

plaintiff, the defendant had delayed on account

of a sum of money which was the delay in completion

company being lost for three days and that the delay was a

material breach of the contract of the defendant and company.

The findings of fact made by the court are as

follow: The court found the facts as to the matter of the

fact that the defendant had delayed on account of a sum of money which was the delay in completion

was a delay of eleven days on account of contingencies over which appellant had no control. The time fixed for the completion of the contract had, for a valuable consideration, been extended by appellee until August 10th. Appellee was therefore, we think, not justified in taking possession of the premises on the 10th of August and completing the work on its own account for the reason that the time limited had not expired and the contractor was therefore not yet in default.

It is the contention of appellee and it was the theory of the court as indicated by its rulings upon the propositions of law that it was the duty of appellant to notify appellee that the engines of the Dodge Manufacturing Company had broken down at or prior to the time that the date for finishing the contract was extended, and that by reason of its failure to give such information, it should be held liable for all damages which appellee sustained by reason of its plant being idle during that time. The court found the amount of such damages to be \$3310.21 over and above any amount which was due to appellant under the terms of its contract, and upon that theory entered judgment against the plaintiff.

We are unable to understand upon what theory this conclusion was reached, or what provisions of the contract, either express or implied, could justify such finding or conclusion.

The provision of the contract that the goods in question should be purchased from the Dodge Manufacturing Company was inserted therein for the benefit of appellee. The evidence discloses that the agents and employees of the Dodge Manufacturing Company gave the information as to the accident at their plant to the Chicago Coated Board Company within a day or two after that information was obtained by the Gifford Wood Company, and there is nothing in the record

was a delay of fifteen days in receipt of communications from

which applicants had no control. The time limit for the

completion of the contract was, but a reasonable extension

was granted in respect of the contract.

Therefore, we think, not justified in taking possession of

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Therefore, we think, not justified in taking possession of

to indicate, but on the contrary it seems to affirmatively show, that appellee could have obtained information as to the situation at the plant of the Dodge Manufacturing Company just as early and as readily as could appellant.

We are of the opinion that the propositions of law submitted by plaintiff were wrongfully refused by the court and that there is no evidence in the record to justify a finding in behalf of the defendant on its claim of offset. But the record is not in such shape that we can estimate plaintiff's damages; hence the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

to be made, and in the event of a withdrawal of the
the attention of the Board of Directors of the
that it is not a valid one.

It is the opinion of the Board of Directors of the
that the same is not a valid one.
and that there is no evidence in the record to justify a
finding in favor of the company in the event of a
But the record is not in such a state as to justify
the Board's finding; hence the judgment will be reversed and
the case remanded.

THE NEW YORK CENTRAL RAILROAD COMPANY
Successor to the Lake Shore & Michigan
Southern Railway Company, a corporation,
Appellee,

vs.

THE PHILADELPHIA & READING COAL & IRON
COMPANY, a corporation,
Appellant.

210 I.A. 267

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered by the Municipal Court of Chicago in favor of plaintiff upon trial by the court without a jury.

The claim of plaintiff was for tariff charges amounting to \$109.90. The facts are stipulated.

On February 14th, 1912, the defendant at Philadelphia delivered to a carrier for shipment a car of coal consigned to itself at Chicago, Illinois. At Buffalo this coal was delivered to appellee who transported it to Chicago where it arrived February 19th, 1912.

On February 20th, 1912, the defendant by an order in writing directed that the car of coal be forwarded to A. F. Cook & Co. (who had purchased same and agreed to pay the freight thereon) at Fullman, Illinois, via the Illinois Central "Charges Follow." The coal was delivered to A. F. Cook & Co. on or about March 6th, 1912, and the plaintiff demanded payment of the freight charges at that time and at various times thereafter from said A. F. Cook & Co., but same has not been paid.

On September 19th, 1912, plaintiff brought suit against A. F. Cook & Co. for the charges and recovered judgment on December 13th, 1912, which remains unsatisfied.

[illegible]

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

On, but not prior to September 22nd, 1914, the defendant was notified by the plaintiff that the freight charges had not been paid and the defendant had up to that time believed that the same were in fact paid.

On the 22nd day of September, 1914, A. F. Cook & Co. became and have ever since been insolvent and have ceased doing business. At the time the coal was delivered to A. F. Cook & Co. it had sufficient assets to pay said freight charges.

Merchants and shippers throughout the United States ship great quantities of coal and other commodities to great numbers of persons throughout the United States over the lines of the railroad companies operating in the United States, and the almost universal custom and practice in such shipments is for the shippers to ship such coal and other commodities without prepayment of the freight charges thereon, and for the railroad companies to waive their right to prepayment of the freight charges thereon, and to accept payment thereof from the consignee.

The court instructed the jury to find the issues for the plaintiff and assessed its damages at \$109.90 and judgment was entered on the verdict.

Appellant claims that appellee by its action in extending credit to A. F. Cook & Co. and by its silence with knowledge that appellant was resting in the belief that the freight had been paid, waived all right to collect it in view of Cook's insolvency. In other words, appellant claims as against the plaintiff an estoppel. In support of this contention with other authorities are cited, - Central Railroad Co. v. MacCartney, 68 U. S. 1, 165-170; Thomas v. Snyder, 39 Pa. St. 317.

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 year 1914, and that the same
 was paid for the year 1914.

The Act to Regulate Commerce, approved February 4th, 1887, controls in this and similar transactions. Appellant, as consignor, was primarily liable for the payment of the freight, and we think the liability could only be discharged by payment. Appellee had no right to release appellant from such liability and its act would have been unlawful had it done so. That which it can not do directly by voluntary action, it can not do indirectly by placing itself in a position where it is estopped. An estoppel can not be founded upon an illegal act or contract. B. & O. S. W. Ry. Co. v. New Albany Box & Basket Co., 94 N. E. 906, 909; Southern Ry. Co. v. Southern Cotton Oil, 91 N. E. 876; Cent. of Georgia Ry. Co. v. Watonton Lumber Co., 80 N. E. 725; C. of G. Ry. Co. v. Birmingham Sand & Brick Co., 64 So., 202, 204 (Ala.)

Appellant argues with much force that the law should construe into every contract of shipment an implied term that where payment of freight is not made by the consignee, notice of such fact should be given to the consignor in order to hold him liable in the event of insolvency of the consignee. No authorities are cited. The argument might very properly be addressed to the national legislature, but can not avail here.

The judgment will be affirmed.

AFFIRMED.

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THE WHITEHEAD & HOAG COMPANY,
a corporation,

Appellee,

vs.

JOHN L. DONOVAN,

Appellant.

210 I.A. 268

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered by the Municipal Court of Chicago in an action brought to recover for the price of merchandise alleged to have been sold and delivered by appellee to appellant.

The affidavit of merits denied the sale and delivery of any goods by appellee to appellant and averred that the sale and delivery with respect to which the plaintiff sued were made at the instance and request of the Federation of American Motorcyclists.

The evidence shows that defendant was chairman of the competition committee of said Federation, which was a voluntary association.

The evidence is uncontradicted that the goods in question were ordered in the name of the association and were charged on the books of the plaintiff to that association. It was also proved that said goods were used by the association and that all payments which were made on account thereof were made by the association and so credited by the plaintiff. There is no competent evidence on which a finding against the plaintiff personally could be based. The judgment will therefore be reversed with a finding of fact.

REVERSED.

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FINDING OF FACT.

We find as a matter of fact that the goods and merchandise for the price of which plaintiffs in this action sued were not sold or delivered to the defendant in this case.

- 1 - 1933

January 25, 1933

On the 25th of January 1933 the goods and
merchandise for the winter of 1932-1933
were not sold or delivered to the 1933-1934

1933-1934

340 - 23306

SAM SIMPSON,
Appellee,

vs.

GRAND TRUNK WESTERN
RAILWAY COMPANY,
Appellant.

3776
210 I.A. 269

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellee as plaintiff sued appellant as defendant in assumpsit on a contract to transport from Chicago, Illinois, to Auburn, Maine, a car-load of horses. Appellee was consignor, and one Jonas Edwards consignee.

It was alleged that appellants so negligently and carelessly handled and treated the horses that they arrived at Auburn, Maine, in a damaged condition, whereby plaintiff was injured.

The proof tended to show that when the car with the horses was delivered in Auburn, Maine, one of the horses was dead and another severely injured.

At the conclusion of plaintiff's testimony, the defendant requested a peremptory instruction in his behalf, which was refused by the court. The jury found for the plaintiff and assessed plaintiff's damages at the sum of \$380.00, upon which verdict the court entered judgment.

The contract under which this shipment was made is what is known as the "Uniform Live Stock Contract." It was signed by the railroad company and also by the consignor. As it related to an interstate shipment the law which must be applied to the transaction is controlled by the Interstate Commerce Act and the decisions of the United States Courts construing the same.

As was said in reference to federal legislation on the subject in Adams Express Co. v. Croninger, 226 U.S. 491, quoted by the Supreme Court of Illinois in the case of Gamble-Robinson Co. v. U. P. R. R. Co., 262 Ill. 400, "That the legislation supersedes all the regulation and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts, but when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist."

It is urged in behalf of appellant that the court should have given the peremptory instruction asked for by defendant at the close of the evidence by reason of a provision of the 7th clause of the contract which provides "That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing verified by the affidavit of the said shipper or his agent, and delivered to the Grand Trunk Western Railway Agent of the said carrier at his office in U. S. Yd. within five days from the time said stock is removed from said car

As was said in reference to Federal legislation on the subject in Alabama Express Co. v. Birmingham, 286 U.S. 401, quoted by the Supreme Court of Illinois in the case of Gamble-Robinson Co. v. U. S. F. & M. Co., 282 Ill. App. "that the legislation superseded all the regulation and policies of a particular State upon the same subject matter from its general character. It embraced the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state legislation with reference to it. Only the absence of Congress authorized the exercise of the police power of the State upon the subject of such contracts, but when Congress acted in such a way as to exclude a purpose to exercise its conceded authority, the regulating power of the State ceased to exist."

It is urged in behalf of appellant that the court should have given the peremptory instruction asked for by defendant of the case of U. S. v. Wilson by reason of a provision of the 7th clause of the contract which provides "that no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or even for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing verified by the affidavit of the said shipper or his agent, and delivered to the Grand Trunk Western Railway Agent at the said carrier at his office in U. S. Yd. within five days from the date when it is received from said

or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs." It is conceded that notice was not given according to the terms of this contract.

In the case of Chesapeake & Ohio Railway Co. v. McLaughlin, 242 U. S. 142, the Supreme Court of the United States passed upon this very clause in a similar contract and upon a record such as we have in this case. The court there said, "It conclusively appears that McLaughlin did not present a verified claim to the carrier's agent as provided by the contract. Upon its face the agreement seems to be unobjectionable and nothing in the record tends to establish circumstances rendering it invalid or excuse failure to comply therewith. The court below erred in denying a seasonable request for a directed verdict; and its judgment must be reversed."

It has also been urged by appellee, although the evidence does not sustain him on this point, that there was a waiver of this notice by appellant. However, as the United States Courts construe the statute, appellant had no right to waive its defense. A. J. Phillips Co. v. Grand Trunk Western Railway Co., 236 U. S. 662.

The judgment of the Superior Court is reversed without remanding.

REVERSED.

355 - 23321

OTTOMAR CARLICHEK,
Appellee,
vs.
OTTO ROTHENSTEIN,
Appellant.

210 I.A. 270

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment of the Municipal Court of Chicago entered upon the verdict of a jury.

Plaintiff's suit was for a balance claimed to be due upon a promissory note and the defense set up was payment.

The defendant upon trial offered evidence tending to show sums due from plaintiff to the defendant on account of commissions and wages earned upon certain alleged contracts between the parties made subsequently to the execution and delivery of the note and the subject matter of which was in no way connected with the note.

Evidence was heard by the court as to such claims, but it afterwards sustained a motion of the plaintiff to strike out this testimony and this is urged here as error. We do not think the court erred. The items in controversy arose out of matters entirely unconnected with the execution and delivery of the note and were, therefore, inadmissible by way of recoupment, and no claim of offset was filed.

Waterman v. Clark, 76 Ill. 428; Keegan v. Kinnare, 123 Ill. 280.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

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48 - 23362

LEO KRAVITZ, a minor, by
Julius Kravitz, his next friend,

Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY,
a corporation,

Defendant in Error.)

210 I.A. 287

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

This is a writ of error to the Superior Court
to reverse a judgment entered upon the verdict of a jury
in favor of the defendant in error, the Chicago City
Railway Company, hereinafter called the defendant, and
against Leo Kravitz, a minor, by Julius Kravitz, his
next friend, plaintiff in error, hereinafter called the
plaintiff.

Plaintiff brought suit to recover damages for
personal injuries resulting from being struck by a car
of the defendant in Halsted street at its intersection
with 14th place. In his declaration he alleged that
while he was crossing Halsted street at 14th place, go-
ing west, the defendant "so carelessly and improperly
drove and managed their motor car that the said car * * *
ran into and struck with great force and violence the
said plaintiff", severely injuring him. The ad damnum
was \$20,000. The defendant pleaded the general issue.

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1. The first rule is that the word "and" is not used in the title.

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RECEIVED BY THE DIRECTOR, FBI, WASHINGTON, D.C. 20535

Journal of Interpersonal Violence 27(12)

On the day of the injury, May 12, 1908, the plaintiff was a minor, between twelve and thirteen years of age. The evidence shows that he was, at the time of the accident, nearly, if not quite, thirteen years of age; that he was in the third grade at school; that he lived within two blocks and a half of the place of the accident; that he had been in Halsted street and that neighborhood a great many times; that he knew which way the cars ran and that they ran at frequent intervals; that his eyesight and hearing were both good; that he was at least an average boy of that age.

The theory of the plaintiff is that between five and six o'clock in the evening, on the day in question, he walked from the southeast corner of Halsted street and 14th place, directly west on the crosswalk until within a few feet of the north-bound car-track where he stopped for a moment to let a north-bound car go by; that as the car passed he started immediately behind it across the tracks; that as he stepped upon the west track he was struck by a south-bound car and his right leg run over and crushed; that the south-bound car was running at a high rate of speed and gave no signal of its approach.

The theory of the defendant is that the plaintiff was "flipping"; that he was seen on the front step of the blind side of the car, that is, on the side next the east or north-bound track, holding to the grab-irons; that he remained there for some time when he disappeared and was shortly afterwards seen hopping on one foot towards the west sidewalk. At the close of all the evidence the jury

found the defendant not guilty and judgment was entered upon the verdict.

This cause has been tried twice and in each case the jury found in favor of the defendant. After the first trial it was brought to this court for review and is reported in 174 Ill. App. 192. It was reversed and remanded for the following reasons: (1) the giving of too large a number of instructions (thirty-nine for the defendant) "many of which directed the verdict for defendant"; (2) the jury were improperly instructed in regard to the degree of care required of the motorman in approaching the crossing; (3) that certain instructions "tended to mislead the jury into believing that the same degree of care to avoid the accident was required to be exercised by plaintiff, a boy of twelve or thirteen years, as would be required of an adult." In the instant case, upon this review, counsel for the plaintiff assign as reasons for the reversal of the judgment (1) that the greater weight of the evidence is against the verdict; (2) that the court erred in instructing the jury on behalf of the defendant.

(1). Is the greater weight of the evidence against the verdict? Counsel, in their brief for the plaintiff, state that from an examination of the testimony, the sole question in the case is whether or not the three witnesses, namely, Flaherty, McKune and Hayes, are worthy of belief, and whether their testimony is sufficient to support the verdict against the testimony of the six witnesses produced on behalf of the plaintiff. We are of the opinion that there was ample evidence to justify the jury in con-

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11. The following information is provided for the year ended 31 December 2019:

1. The first question is the one in regard to the fact that the

These authors also found that the use of a single, standardized, and validated instrument is essential to ensure the reliability and validity of the data.

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cluding that the plaintiff was not struck by a southbound car at the intersection of Halsted street and 14th place, but that he was "flipping" and fell or voluntarily got off somewhere between 14th place and the viaduct. After a careful analysis of the evidence of all the witnesses, we are unable to find any valid reason for discrediting the testimony of the three witnesses above mentioned. It follows, therefore, that we are not justified in over-riding the verdict of the jury.

(2) It is contended by counsel for the plaintiff that the court erred in giving such a large number of instructions on behalf of the defendant. Having in mind that it is the law that the number of instructions given may not be arbitrarily limited by the trial court (Chicago Union Traction Co. v. Olsen, 211 Ill. 255), and considering the contents of the instructions under consideration, we are of the opinion that the giving of the twenty-three instructions on behalf of the defendant did not, in number or quantity, constitute error. Chicago City Ry. Co. v. Wandusky, 198 Ill. 400; Union Traction Co. v. Hanthorn, 211 Ill. 367.

It is also contended by the plaintiff that the court erred in giving so many instructions concluding in effect that a verdict of not guilty should be returned. Of the instructions given by the defendant, 1, 2, 3, 15, 17, 18, 21 and 22 concluded, with a general direction, that if the jury found the facts as therein stated, they should find the defendant not guilty. Assuming, as we do, that the general contents of those instructions were proper

stating that the statement was not made by a person named as the informant of the statement, and that the statement was not made by a person named as the informant of the statement.

The statement was made by a person named as the informant of the statement, and the statement was made by a person named as the informant of the statement. The statement was made by a person named as the informant of the statement, and the statement was made by a person named as the informant of the statement.

(1) It is stated that the statement was made by a person named as the informant of the statement, and the statement was made by a person named as the informant of the statement. The statement was made by a person named as the informant of the statement, and the statement was made by a person named as the informant of the statement.

considering the statement of the informant under consideration, we are of the opinion that the statement is reliable. The statement was made by a person named as the informant of the statement, and the statement was made by a person named as the informant of the statement.

It is also stated by the informant that the statement was made by a person named as the informant of the statement, and the statement was made by a person named as the informant of the statement. The statement was made by a person named as the informant of the statement, and the statement was made by a person named as the informant of the statement.

and appropriate to the evidence and the law of the case, we are of the opinion that although they involved the reiteration of certain principles of law, more favorable to the defendant than to the plaintiff, their repetition, under the circumstances of the case, was sufficiently justified.

As to the further contentions of the appellant, that the court erred in giving so many instructions on contributory negligence; in repeatedly instructing the jury as to the defendant's theory of the case; in repeatedly instructing the jury that sympathy for the plaintiff should have no influence; that the plaintiff could not recover unless he proved by a preponderance of the evidence that he had sustained injuries as charged in the declaration, we are of the opinion, after a careful examination of these instructions, that, under the circumstances of this case, they were all properly given.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

228 - 23573

WILLIAM DOWNS,

Appellant,

vs.

MALINDA LAMBUR,

Appellee.

210 I.A. 319

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

William Downs brought suit in the Municipal Court of Chicago against Malinda Lambur to recover \$184.22 for work and labor performed and materials furnished. The defendant filed an affidavit of merits which set up as bar to the suit a judgment rendered on the verdict of a jury in a suit between the same parties involving the same subject-matter. To the affidavit of merits plaintiff filed a reply seeking to avoid the defense interposed. The court on motion of the defendant struck the reply from the files. Plaintiff elected to stand by his reply and judgment was entered in favor of the defendant, to reverse which plaintiff prosecutes this appeal.

Plaintiff by his statement of claim seeks to recover for materials furnished and work done under two oral contracts. He admits that he had brought another suit to recover for the same matters against the defendant, but contends that his claim in that case was based not upon the oral or express contracts but on an implied contract; that in that case there was a verdict and judg-

210. A. 312

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William Henry Brown was in the United States of America against William Brown to recover \$104.00 for work and labor performed and materials furnished. The defendant filed an affidavit of service which set up as bar to the suit a judgment rendered on the verdict of a jury in a suit between the same parties involving the same subject-matter. As the affidavit of service plaintiff filed a reply seeking to avoid the defense interposed. The court on motion of the defendant struck the reply from the file. Plaintiff elected to stand by his reply and judgment was entered in favor of the defendant, to recover which plaintiff prosecutes this appeal.

Plaintiff by his statement of claim seeks to recover for materials furnished and work done under two contracts. He admits that he had previous and other suits in progress for the same materials against the defendant, but contends that his claim in this case was based on a contract for work to erect a structure and on an implied

ment in favor of the defendant, but that defendant in the former trial contended that that verdict and judgment would not bar plaintiff if he thereafter brought a suit on the express contracts, and induced the court to take this view of the case; that plaintiff acquiesced in this ruling of the court and for this reason plaintiff contends defendant is now estopped to urge that the former judgment is res judicata. The record does not disclose just when, how or in what manner, plaintiff acquiesced in defendant's contention, but in any event we think it immaterial. If it developed on the first trial that the plaintiff's claim was upon an express and not an implied contract, he could have obtained leave to amend his statement of claim. Furthermore, if counsel for the defendant and the court were wrong as to the law, plaintiff had his remedy in a court of review. On the former trial plaintiff having taken the position that his claim was based on an implied contract, we must assume that his evidence tended to support this theory, as he persisted in this position by submitting it to a jury. It would be anomalous to permit him to shift his position after he has been defeated. We think the case of Davis v. Wakelee, 156 U.S. 680, relied upon by plaintiff, is not in point. It was there held that where in a bankruptcy proceeding the bankrupt insisted that a creditor who was opposing his discharge had a valid judgment for the same in another court, the bankrupt could not afterwards contend that the judgment was invalid. In that case the claimant never took the position that the judgment was invalid, - - he always pursued a consistent course, while in the instant case he first sought to recover on the theory of an implied contract and after being defeated he now seeks to recover on an express

went on theory of the defendant, but that defendant in the
present trial presented the same theory and defendant would
not be able to prove it. It is the defendant's theory - that on the
defendant's evidence, he intended the court to take this view
of the case; that defendant's evidence is this view of
the case and the fact that defendant's evidence is this view of
is now offered to show that the present judgment is not
logical. The record now set before the court, now
or in what manner, slightly suggested in defendant's
contention, but in any event we think it unnecessary. It
is developed on the facts that the defendant's claim
was upon an agreement and not an implied contract, as would
have been the case if the defendant's claim was upon an
agreement. It is not the defendant's claim and the court was wrong
as to the law, defendant had the remedy in a court of review.
On the former trial defendant having taken the position that
his claim was based on an implied contract, we must assume
that the evidence failed to support this theory, as he per-
sisted in this position by introducing it to a jury. It
would be impossible to permit him to shift his position
after he has been defeated. We think the case of Wright v.
Wheeler, 128 N.E. 280, relied upon by defendant, is not in
point. It was there held that where in a bankruptcy proceed-
ing the bankrupt insisted that a creditor who was claiming
his discharge had a valid judgment for the same in another
court, the bankrupt could not afterwards contend that the
judgment was invalid. In that case the claimant never took
the position that the judgment was invalid, - he always
asserted a consistent course, while in the instant case he
first sought to recover on the theory of an implied contract

contract. On the first trial plaintiff could have amended his pleadings if the proof warranted it, and having failed to do so, after being defeated, he will not be permitted to shift his position and retry the case.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

contract. In the first trial, the defendant was found guilty of the crime. The jury was instructed to find the defendant guilty if the evidence showed that he had committed the crime. The defendant was found guilty of the crime. The jury was instructed to find the defendant guilty if the evidence showed that he had committed the crime. The defendant was found guilty of the crime. The jury was instructed to find the defendant guilty if the evidence showed that he had committed the crime.

The defendant was found guilty of the crime.

is affirmed.

WITNESSES

JOSEPH SOUKUP, Executor of the
Estate of Frank Soukup, Decensed,

Appellant,

vs.

MODERN WOODMEN OF AMERICA,
a corporation,

Appellee.

210 I.A. 320

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Frank Soukup brought suit in the Municipal
Court of Chicago against the Modern Woodmen of America
on a benefit certificate issued by the defendant on
the life of his son, Frank M. Soukup. After the suit
was instituted Frank Soukup died and his executor was
substituted as plaintiff. At the close of the evidence
there was a directed verdict for the defendant.

The certificate on which the suit was brought
was issued in 1909. The contract of insurance was evi-
denced by the application certificate and by-laws. The
by-laws provided for the payment of an assessment each
month, and that any member who should fail to pay such
assessment on or before the last of the month should
ipso facto become suspended and the benefit certificate
null and void. They also contained a provision that
a member might be reinstated by paying all dues and
assessments within sixty days from the date of suspen-

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sion, provided he was then in good health. Frank M. Soukup did not pay the assessment for the month of April, 1914, and under the by-laws stood suspended, May 1, 1914. This assessment was afterwards paid on May 15, 1914, and three days later, May 18th, Frank M. Soukup died.

The evidence discloses that Frank M. Soukup on May 15th was not in good health, but was suffering from endocarditis, from which disease he died, and that he had been suffering from this disease for about three weeks. It follows therefore that at the time Frank M. Soukup died he was not in good standing but was suspended and no recovery can be had. Plaintiff, however, contends that the defendant by a course of conduct had waived the payment of the assessments during the months in which they respectively became due; that the evidence shows that Frank M. Soukup for about three years prior to his death had been paying assessments quarterly, and therefore he was not suspended at the time of his death. The evidence does show that during the last two or three years the assessments were paid substantially every three months, but each of these payments was made before the expiration of the sixty days within which he could be reinstated. The evidence also shows that he was reported suspended each time he failed to pay during the month. The conclusion to be drawn from this is not that Frank M. Soukup was not suspended, but that he was actually suspended and reinstated, because he made the payments

also, provided he was free in good health. It was
Selling did not pay the agreement for the month of
April, 1914, and under the by-law later suspended.
May 1, 1914. This suspension was afterwards paid on
May 10, 1914, and after that later, May 1914, Frank
J. Jones 1914.

The witness testified that after the
on May 10th was not in good health, but was maintaining
from responsibility, from which he was released, and
that he had been suffering from a disease for some
time. It follows that he was not in good health
when he was paid the money for the month of May
and suggested that no recovery was made. He testified,
however, that the defendant of a... and of
contact had made the payment of the agreement during
the month in which the defendant had been paid the
one hundred dollars for the month of May. He testified
that after the defendant had been paid the agreement
monthly, and thereafter he was not responsible for the
time of his death. The witness also testified that
the first two or three years the defendant was
paid sufficiently every three months, but when it
came payments were made before the expiration of the
sixty days which would be paid be reinstated. The
evidence also shows that he was reported suspended
each time he failed to pay during the month. The con-
clusion to be drawn from this is not that Frank J.
Jones was not suspended, but that he was actually
suspended and reinstated, because he made the payments

within the sixty days. So far as the evidence discloses, the defendant waived nothing at any time. As Frank M. Soukup was not a member of the defendant order in good standing at the time of his death, no recovery could be had on the certificate. The judgment of the Municipal Court of Chicago is, therefore, correct, and it is affirmed.

AFFIRMED.

within the sixty days. He has on the evidence presented,
the defendant waived raising at any time. In Frank M.
Goulding was not a member of the defendant since it was
found that at the time of his death, no recovery could be
had on the certificate. The judgment of the
Court of Chicago is, therefore, correct, and it is so-
lved.

WATSON

555 - 23900

SAM LAPIN,

Appellee.

vs.

FRANK HUNT, doing business as New Jackson Hotel,

Appellant.

210 I.A. 328

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Sam Lapin brought suit against Frank Hunt, doing business as the New Jackson Hotel, seeking to recover \$200 on account of the loss of a diamond stud. The case was tried before the court without a jury, there was a finding and judgment in favor of plaintiff for \$200, to reverse which defendant prosecutes this appeal.

The record discloses that about one o'clock on the morning of November 28, 1916, plaintiff and another person procured a room for the night at defendant's hotel; that plaintiff stated to the night clerk in charge that he desired to deposit some valuables; that the clerk delivered an envelope to plaintiff for that purpose; that plaintiff placed his valuables in the envelope, sealed it up and returned it to the clerk who placed it in the safe; that the next morning plaintiff from his room signaled for the bell boy and gave him the receipt for the envelope and requested him to get the same from the office and bring it to plaintiff, which was done; that thereupon plaintiff opened the envelope, emptied the contents upon the table and claimed

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the diamond stud was missing. He at once made complaint to the defendant.

Evidence was offered on behalf of plaintiff that tended to show that the envelope had been tampered with. On behalf of the defendant this contention was strenuously denied, and the defendant introduced evidence tending to show that when the envelope was handed to the clerk he immediately put it in a box in the safe, locked the box, and afterwards the safe was also locked, and nobody had access to it until in the morning when the safe was opened and the delivery of the envelope made; that the envelope was then sealed and in the same condition as when given to the clerk and had not been tampered with.

We have carefully examined all the evidence in the record, and it would serve no useful purpose to analyze or discuss it; and while we might be better satisfied if the finding and judgment were in favor of the defendant, yet the trial judge saw and heard the witnesses, and was in a much better position to determine the fact in controversy than we are, and after a careful consideration of all the evidence, we are unable to say that the finding is manifestly against the weight of the evidence. It follows, therefore, that the judgment of the Municipal Court of Chicago must be affirmed.

AFFIRMED.

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Approved by the Board of Directors on 11/11/2010

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184 - 23527

W. E. MARQUAM,

Appellee,

vs.

DOMESTIC ENGINEERING CO.,
a corporation,

Appellant.)

210 I.A. 337

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is a suit brought by the appellee for money alleged to be due him from the appellant on an employment contract. There was a verdict for the plaintiff and the jury assessed his damages at \$300.00 and the court entered judgment against the defendant for that amount, from which the defendant has appealed.

The contract in question consists of a proposition made by the defendant to the plaintiff, as contained in its letter to him and his acceptance of it. The proposition, as contained in that letter, reads as follows:

"We desire your services as editor of Domestic Engineering, beginning the second week in October, for which we agree to pay you \$50.00 per week.

It is also understood that if, by the first of January, you can handle to advantage the combined editorial work and the business management, we will pay you, beginning that date, three thousand dollars per year."

Under this contract, the plaintiff entered the employ of the defendant on October, 1912, receiving a salary of \$50.00 per

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week. His salary was not increased on January 1st, whereupon he took the matter up with one of the officers of the defendant company, saying, "Our agreement calls for a change in salary and I notice that the change has not been made." Mr. Keeney, the official in question, replied, "Well, we will take it up later." The following month the plaintiff says he again called the matter to Mr. Keeney's attention and that Mr. Keeney replied, "Well, our expenses are still heavy and I do not feel that we can take the matter up at just this moment", and the plaintiff testified that Mr. Keeney told him he would consider it further and let him know. Again the plaintiff complained to Mr. Keeney, along in the summer, to the effect that he had a written agreement for an increase in salary and had not yet received it and Mr. Keeney again put the plaintiff off and said he was not ready to take the matter up at that time. The plaintiff took the question up with him in October, 1913, and at that time the plaintiff's salary was increased to \$60.00 a week. It appears from the evidence that the plaintiff was satisfied with this and took the \$60.00 each week and said nothing about anything being due him for the part of 1913 prior to October, beyond the \$50.00 a week which he had received during that period. In the fall of 1914 the defendant dispensed with the plaintiff's services altogether, whereupon he brought this suit claiming first, his salary for the balance of the year 1914 at the rate of \$3000.00 per year and second, claiming the difference between that rate and the rate of \$50.00 per week for the period beginning January 1, 1913, and ending in October, 1913, when his salary was changed to \$60.00 per week.

The trial court held that the contract in question

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amounted to a hiring-at-will and that the plaintiff was not employed for any specified time and therefore the defendant had the right, under the contract, to dispense with the plaintiff's services at any time and he was not entitled, under the contract, for damages for a wrongful discharge, as claimed by him. As to the first item of the plaintiff's claim, the court instructed the jury to find for the defendant; but the court overruled defendant's motion for a peremptory instruction on the second item of plaintiff's claim and the defendant stood on its motion and submitted no evidence. It is urged by the defendant that the court erred in overruling defendant's motion to find the issues in its favor on the second item of the plaintiff's claim as well as on the first item.

The contract involved in this case was a hiring-at-will, both as to the employment itself and as to the increasing of the salary. Under the contract the defendant not only had the right to dispense with the plaintiff's services whenever it chose to, but also the question of the increase in the plaintiff's salary was left, under the contract, entirely to the discretion of the defendant. The only provision in the contract relating to the increase in the salary from \$50.00 per week to \$3000 a year was to the effect that this change was to be made "if, by the first of January, you can handle to advantage the combined editorial work and the business management." Of course this condition, worded as it is, leaves the matter entirely within the discretion of the defendant, and, that being the case, it is not such an agreement as the employee can enforce, and, consequently the plaintiff cannot recover the amount involved in the first item of his claim in this case unless there was some further promise on

was held to a hearing - will not hold the plaintiff was not
 employed for any specified time and therefore the defendant
 had the right, under the contract, to discontinue with the
 plaintiff's services at any time and he was not entitled
 under the contract, to damages for a wrongful discharge,
 as claimed by him. He is the first item of the plaintiff's
 claim, the court instructed the jury to find for the defendant
 and the court awarded defendant's verdict for a sum
 money according to the second item of plaintiff's claim
 and the court awarded him the sum of \$10,000.00
 more. It is urged by the defendant that the court erred
 in overruling defendant's motion to find the award is too
 large on the second item of the plaintiff's claim as well
 as on the first item.

The contract involved in this case was a "hyphen-
 ate", such as is the employment itself and as to the provision
 ing of the salary. There was provided the defendant not only
 had the right to discontinue with the plaintiff's services when
 even it pleased, but also the amount of the payment in
 the plaintiff's salary was set, under the contract, entirely
 to the discretion of the defendant. The only provision in
 the contract relating to the payment of the salary from
 \$10.00 per week to \$100.00 a year was to the effect that this
 change was to be made "if, at the time of January, 1920 and
 in the event of savings and investment additional work was done
 for defendant". It seems this condition, worked as it is,
 leaves the matter entirely within the discretion of the de-
 fendant, and, that being the case, it is not such an arbitrary
 as the plaintiff now alleges, but, necessarily, the plaintiff

the part of the defendant to the effect that this increase would be paid. We have carefully examined the record but can find no evidence that would indicate that any such promise was made. If, upon the plaintiff making the complaint early in 1913, the defendant, through any duly authorized agent, had assured him that if he would continue with the company the increase called for would be paid from and after the first of January, although they were not in a position to make the increased payments then, and, relying on this promise, the plaintiff had gone ahead, he might be in a different position, but this is not what happened. The plaintiff testified that after the first pay day following the first of January, 1913, he told Mr. Keeney that their agreement called for a change in salary and he noticed that the change had not been made and he testified that Mr. Keeney replied, "We will take it up later", referring, of course, to the change in salary. The plaintiff continued to take it up with the defendant from time to time but the change was never made until October, and at no time was there any new agreement by the defendant to the effect that the change was to be considered as taking place on January 1st.

In our opinion the same reason which led the trial court to instruct the jury to find the issues for the defendant as to the plaintiff's claim for damages for a wrongful discharge, makes it necessary to hold that the trial court erred in denying defendant's motion to find the issues in its favor as to the plaintiff's claim for his increase in salary for the period beginning January 1, 1913, and ending in October of that year. In other words, as we have stated above, this contract was so worded as to make it a hiring-at-will both as to the increase in salary and as to the employment itself. There-

-5-

fore the judgment of the trial court will be reversed.

REVERSED.

However, if the same thing is to happen, it will

191 - 23534

KIVE SIEGEL, JOSEPH J.
SIEGEL & HARRY SIEGEL,
co-partners, doing bus-
iness as K. SIEGEL & SONS,

210 I.A. 338

Appellees,

APPEAL FROM

vs.

MUNICIPAL COURT,
OF CHICAGO.

HYMAN COHEN,

Appellant,

MR. JUSTICE THOMSON delivered the opinion of the court.

This is a fourth class action in the Municipal Court brought by the appellees upon a claim for goods, wares and merchandise sold and delivered to the appellant amounting to \$550.00. The issues were submitted to the trial court without a jury and the court found the issues for the plaintiffs and assessed their damages at the full amount of their claim, for which judgment was duly entered. From that judgment the defendant has appealed.

The affidavit of merits filed by the defendant sets up a plea of accord and satisfaction. There is no dispute between the parties as to the amount which the defendant owed the plaintiffs, \$550.00. The defendant was in business in Chicago and the plaintiffs were located in New York. On or about December 20, 1915, the plaintiffs received a notice from the defendant calling a creditor's meeting for the following day in Chicago. The plaintiffs were not represented at that meeting. On December 24th

the plaintiffs received a letter from either the defendant or his representative, enclosing a check for \$137.50, which the letter stated was being sent "in full for your claim against Mr. Cohen." On January 5th following, one of the Siegels came to Chicago and conferred with the defendant. The plaintiffs' testimony is to the effect that at that time the defendant was advised that the check could not be accepted in full payment of the account and was tendered back to the defendant who declined to accept it and urged the plaintiff to keep it, at the same time promising to pay the balance of the account in monthly installments. There is also some evidence to the effect that there were further tenders of the check to the defendant by the plaintiffs and further promises by the defendant to pay the balance of the account, which testimony the defendant denies.

The defendant contends that the payment and acceptance of any amount less than the amount due to a creditor, by a debtor who is in failing circumstances, is sufficient to discharge the whole debt. This proposition, however, is not applicable to this case. Not only is there no proof in the record that, at the time the creditors' meeting was held, the defendant was in failing circumstances financially, but, in view of all the evidence before the court, an inference might well be drawn to the contrary, and further, the record contains no proof of acceptance of the check by the plaintiffs as payment for the whole debt. In support of his contention the defendant cites the case of Curtiss v. Martin, 20 Ill. 557, where the court says, "If the smaller sum be taken by way of compromise of a controverted claim or from a debtor in failing circumstances, in full discharge of the

The plaintiff's testimony is that after the defendant
or his representative, enclosing a check for \$100.00, which
the latter would not bring and the fact that the
plaintiff's name is on the check is not
the plaintiff's testimony is that the check was not
accepted in full payment of the account and was returned
back to the defendant who declined to accept it and urged
the plaintiff to keep it, at the same time promising to pay
the balance of the account in monthly installments. There
is also some evidence to the effect that there were further
payments of the check to the defendant by the plaintiff and
further promise by the defendant to pay the balance of the
account, which testimony the defendant denies.

The defendant's contention that the plaintiff was not
entitled to any amount less than the amount due is a question
by a debtor who is in failing circumstances, is entitled
to discharge the whole debt. This proposition, however, is
not applicable to this case. Not only is this a case
in the record book, at the time the creditor's meeting was
held, the defendant was in failing circumstances financially,
but, in view of all the evidence before the court, an infer-
ence might well be drawn to the contrary, and further, the
record contains no proof of acceptance of the check by the
plaintiff as payment for the whole debt. In support of his
contention the defendant cites the case of Kearney v. Kearney,
100 Ill. 557, where the court says, "If one smaller sum be

paid by way of installment of a contracted claim or from a
series of partial payments, the debt is not thereby

debt, no reason is perceived why it should not be binding on the parties." Such a statement is not applicable to the facts in the case at bar, and the same is true with regard to the case of Winter v. Meier, 151 Ill. App. 572, also cited by the defendant. In that case the creditor accepted the money proffered by the defendant and surrendered to the debtor all evidence of the indebtedness and gave him a written release of all claims. These facts the court held tended strongly to corroborate the defendant's contention to the effect that the creditor had taken the money in full satisfaction of the indebtedness and that the debtor had not promised to make full payment as the creditor claimed. In the case at bar, there are no such facts in evidence.

Where a debtor sends his check to a creditor for an amount less than that which is claimed, with the statement that he is sending it in full payment of the claim, and the creditor retains the check without depositing it or cashing it and later advises the debtor that he cannot consider the remittance in question as a payment of the account in full, it cannot be said that there was an accord and satisfaction of the debt. Groh v. Great Eastern Casualty & Indemnity Co. of New York, 155 Ill. App. 13; Strong v. King, 35 Ill. 9; Woodburn v. Woodburn, 115 Ill. 427; 2 Daniels: Negotiable Instruments, Sec. 1623.

If there is a bona fide dispute between the creditor and his debtor as to the amount due, and the debtor remits his check for an amount less than that claimed by the creditor, with the statement that the check is being sent in full payment of the account, and the creditor deposits the check or cashes it, there is an accord and satisfaction. Ostrander

v. Scott, 161 Ill. 339; Lapp v. Smith, 183 Ill. 179; San-ton Union Coal Co. v. Parlin & Grendorff, 215 Ill. 244; Unow v. Griesheimer, 220 Ill. 106. But, if the amount of the in-debtedness in question is not disputed, and the debtor sends the creditor his check for an amount less than the amount of the debt, with the statement that it is being sent in full settle-ment of the indebtedness, and the creditor, upon receiving it, cashes it and, thereupon, or within a reasonable time, noti-fies the debtor that he cannot consider the remittance in question a payment of the indebtedness in full, there will be no accord and satisfaction. Teague v. Burns Lumber Co., 187 Ill. App. 225.

The defendant contends that the retention of a check for an unreasonable length of time constitutes an acceptance of it under the conditions imposed by the debtor in sending it and amounts to an accord and satisfaction, citing the case of Day-Luettwitz Lumber Co. v. Berrell, 177 Ill. App. 30. In that case the question of the amount due a creditor from a debtor was in dispute, and the court holds that where that is the situation and the debtor sends the creditor a remittance for less than the amount claimed by the creditor to be due, the debt will be considered as having been paid in full if the creditor retains the remitt-ance with the intention of receiving it in full payment; and the court holds, further, that, if the creditor retains it an unreasonable time without repudiation, the law may infer such intention on his part. In that case the remittance involved was a bank draft, and the court specifically confines its holding to such a remittance as a bank draft or a cashier's check, or the check of some third person, and not that of the debtor. Though the check here seems to have been that of a

third party, that case is not in point because there was dispute between the parties in that case as to the amount which was due. In the case at bar there was no such dispute but it is admitted that there was a balance of \$550.00 due the plaintiffs from the defendant on an open account. The situation in the case at bar is similar to that involved in the case of Teague v. Burns Lbr. Co., *supra*. In such a case, there being no dispute between the parties as to the amount of the debt, if the debtor remits an amount less than the balance due, with the statement that it is being sent in full payment of the account, there will not be an accord and satisfaction if the creditor retains the check; and such will not be the case even if he cashes the check. Even if this had been a case where the amount due was in dispute between the parties and the situation presented was similar to that involved in the case of Day-Luellwitz Lumber Co. v. Serrell, *supra*, it could not be considered that there was an accord and satisfaction because the evidence fails to show that the plaintiffs retained the remittance for an unreasonable length of time, in view of all the circumstances. The plaintiffs were in New York and received the check the day before Christmas, and, immediately after the first of January, one of the plaintiffs came to Chicago and on the fifth of January had a talk with the defendant and told him they could not consider the check as payment of the account in full.

The burden of proving an accord and satisfaction is upon the party pleading it. The evidence on this issue in the case at bar was conflicting. We have examined the record and are unable to say that the finding of the trial

third party, that case is not in point because it was
 supposed between the parties in that case as in the present
 which was done. In the case of the present case, it is
 said that it is admitted that there was a balance of \$100.00
 and the plaintiff from the statement on the books account.
 The statement in the case of the plaintiff is that the
 balance in the case of James V. Smith was \$100.00.
 In such a case, it is being an amount between the parties
 as to the amount of the debt, or the money owing as
 amount for which the balance was, with the statement that
 it is being paid in full payment of the account, that this
 not be an account and the plaintiff is the plaintiff and
 the debt; but the plaintiff is the plaintiff and the debt
 the debt. Then it is said that the plaintiff is the plaintiff
 and was in dispute between the parties and the plaintiff
 presented was similar to that involved in the case of the
plaintiff James V. Smith, and, it would not be an
 answer that there was an account and the plaintiff is the
 evidence that is now that the plaintiff is the plaintiff and the
 evidence is an unresolvable issue of fact, in that all
 the circumstances. The plaintiff is the plaintiff and the
 received the check the day before the trial, and, immediately
 after the trial of January, when the plaintiff is the plaintiff
 because and on the fifth of January, when the plaintiff is the plaintiff
 present and said that they could not continue to work on
 payment of the account in full.

The burden of proving an account and satisfaction
 is upon the party claiming it. The evidence on this issue
 in the case of the present case, is that the plaintiff is the plaintiff
 second and the plaintiff is the plaintiff and the plaintiff is the plaintiff

court was not warranted. On the contrary, it seems clearly to have been borne out by the evidence submitted.

Finding no error in the record, the judgment of the trial court is affirmed.

AFFIRMED.

to the fact that the Government has not yet decided on the

policy to be followed in the future.

It is to be hoped that the Government will be able to

decide on a policy in the near future.

Yours faithfully,

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WILLIAM H. FISHER,

Appellee,

vs.

WILLIAM H. WECKER,

Appellant.

210 I.A. 345

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action of the fourth class in the Municipal Court of Chicago wherein the plaintiff, William H. Fisher, sought to recover the rent due from the defendant, William H. Wecker, under a written lease, for the months of November and December, 1916, and January, 1917. Judgment was entered for the plaintiff by confession on January 20, 1917, for \$147.50 which included rent for the three months at \$42.50 a month and \$20.00 as attorney's fees. Some days thereafter, on defendant's motion, the court entered an order giving the defendant leave to appear and make his defense, the judgment to stand as security. An affidavit of merits was filed and a trial was had before the court without a jury. At the trial it appeared that the defendant had made a payment of \$20.00 on January 20, 1917, the day on which the judgment by confession was entered. Plaintiff conceded that the defendant was entitled to that credit. After hearing the evidence, the court found the issues for the plaintiff and entered an order re-

ducing the judgment which had been entered by confession to the extent of the payment which the defendant had made, "for which amount said judgment be affirmed and ordered to stand in full force and effect as the judgment of this court as of the date of rendition thereof." From this judgment for \$127.50, the defendant has appealed.

The defendant contends that, inasmuch as the judgment which was entered by confession was changed after the hearing of the case on its merits, it was error for the trial court to include any sum as attorney's fees in the final judgment, citing Cooke Co. v. Johnson, 179 Ill. App. 83 and Morris-on Hotel & Restaurant Co. v. Biraner, 245 Ill. 431. Neither of those cases is in point for in both of them the judgment which was entered by confession was vacated, whereas in the case at bar it was not. In our opinion the trial court was not in error in allowing the attorney's fees which had been included in the judgment which was entered by confession, to remain in the judgment as finally confirmed, not only because the judgment which had been entered by confession was not vacated but merely reduced by a sum which the defendant had paid on account on the day the judgment by confession was entered, but for the further reason that, after the matter had been heard on its merits, the finding was against the defendant. The latter is the true test as to whether attorney's fees should be included in the judgment as finally entered. If, after the case has been reopened and the defendant allowed to plead and a trial has been had on the merits, the finding is against the defendant, it is proper to include a reasonable sum as attorney's fees in the final judgment whether the judgment by confession has been vacated or not. Where the defendant has such a case reopened and is given leave to plead to the

[illegible]

merits, it is not the proper practice to vacate the judgment which has been entered by confession but the order giving the defendant leave to plead should direct further that the judgment stand as security and that no further proceedings be taken thereon until the further order of the court. But where, for any reason, the judgment is vacated and another judgment in favor of the plaintiff results from the trial of the case on the merits, the plaintiff should have the benefit of the provision in his judgment note calling for the allowance of attorney's fees in case the note is reduced to judgment.

The main contention of the defendant in seeking to have the judgment of the trial court reversed is that it is against the manifest weight of the evidence. The defense which was interposed was one of payment, and, on that issue, the defendant had the burden of proof. The plaintiff had brought his suit to recover rent under a lease for the months of November and December, 1916, and January, 1917. The defendant produced no receipts for any part of the rent for those months, his last receipt being one dated December 5, 1916, for the rent for the month ending October 31, 1916. The defendant also produced receipts for each and every month previous to that, back to and including one dated April 5, 1916, which acknowledged the rent for the month ending March 31, 1916. The defendant also produced a receipt dated March 4, 1916, which likewise acknowledges receipt of the rent for the month ending March 31, 1916. This receipt was signed by the name of the renting agent "By C.L.". The next receipt was one dated February 4, 1916, acknowledging

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receipt of the rent for the month ending February 29, 1916. This receipt was signed by the name of the renting agent "By G.W.A." The evidence shows no credit on the books of the renting agent for any payment corresponding to the receipt of February 4th and they show, further, that the payment corresponding to the receipt of March 4th is credited as being the payment of the rent for the month of February. In the entire list of receipts, these are the only two that happen to fall on the same day of the month, the fourth. One Alexander, who is in the employ of the renting agency, was a witness and testified that he received rent from the defendant on March 4th but that the initials appearing on the receipt of that date produced by the defendant are not his. He testified further that he presumably gave the defendant a receipt when he collected the payment of March 4th but he does not remember it distinctly. He also testified that the initials on the receipt produced by the defendant and dated February 4th were his initials but that the figures indicating the date did not look like his figures. From this evidence it seems quite possible, if not probable, that the receipt produced by the defendant purporting to be dated "2/4/16" was the receipt issued by Alexander under date "3/4/16" and that either an error had been made in dating the receipt or the date had been subsequently altered. There is a payment credited on the books of the agent under date of March 4th but no payment credited under date of February 4th. There is no further evidence in the record to account for the receipt initialed "G.L.", which was the one dated "3/4/16" and was the first of the two receipts acknowledging the March rent, the second one being dated "4/5/16." The initials "G.L." do not appear

on any of the other receipts produced by the defendant. It is the defendant's contention that he made all the payments called for by the receipts he produced and that the one dated "4/5/16", which was the second one acknowledging payment of the March rent, should have acknowledged payment of the April rent. This, however, would make each succeeding receipt produced by the defendant, out of the way by one month and would make those receipts acknowledge rent for a month earlier than the correct one. For instance, the defendant contends that the receipt dated in April should have acknowledged receipt of the rent for that month instead of for the month of March, and the one dated in May should have acknowledged the rent for May instead of for April, and so on. It is difficult to accept this view of the facts for all through the year the defendant took these receipts acknowledging receipt of the rent, not for the current month, but for the month previous, and, along in the summer, when the defendant missed another month, for two months previous, without any complaint or anything from him to indicate that there was any error about them.

In view of all the evidence, the defendant cannot be said to have proven by a preponderance of the evidence the payment of the rent for any part of the three months for which the plaintiff brought his suit.

Finding no error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

JAMES F. BISHOP, Administrator
of the Estate of Abraham Foster,
deceased,

Appellee,

vs.

CHICAGO TELEPHONE COMPANY,
Appellant.

210 I.A. 347

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDEN

DELIVERED THE OPINION OF THE COURT.

Plaintiff's intestate was in his lifetime employed by defendant as a telephone installer, and it is claimed that while he was engaged in this occupation and while working upon a telephone pole of defendant on June 11, 1911, he fell by reason of the weak and insecure condition of a spike in said pole. It is charged that such insecure condition of the spike in the pole was attributable to the negligence of defendant. As a result of said fall plaintiff's intestate was injured, particularly about his breast, from which injuries it is claimed he died June 28, 1914.

There are three counts in the declaration. The first count charges that while plaintiff's intestate was using all care for his own safety some of the spikes gave way under his use thereof, and he was unavoidably thrown downward and against said pole and spikes and his breast jammed and bruised thereby, and that as a natural proximate result of such jammed and bruised condition of the breast disease developed therein from which he died June 28, 1914. The second count alleges that plaintiff's intestate was greatly hurt, bruised and strained in and about his body and his breast was greatly bruised and injured, from which bruises and injuries and the natural effects thereof he

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died June 28, 1914; and in the third count the injuries and death are alleged to have resulted from plaintiff's intestate having been unavoidably greatly hurt and bruised, particularly about his breast.

The negligence charged in the declaration resolves itself into one of failure of defendant to furnish plaintiff's intestate a safe place in which to perform his duties and do his work. Defendant interposed to this declaration a plea of not guilty. There was a trial before court and jury and a verdict and judgment in favor of plaintiff for \$3500 and defendant appeals.

There are many errors in procedure, both in rulings upon evidence and upon instructions; but in the conclusion at which we have arrived it will be unnecessary to refer to any of these errors in this opinion. We base our judgment upon the absence of causal connection between the injuries declared upon and the cause of the death of plaintiff's intestate, and likewise the lack of proof that the spike from which it is alleged plaintiff's intestate fell was negligently maintained by defendant or was out of repair at the time, or that the pole in which the spike rested was in a condition of decay, or that either pole or spike was otherwise defective.

Plaintiff contends that his intestate died of cancer of the breast and that the cancer is traceable to the injuries suffered in consequence of defendant's negligence in maintaining in an unsafe and dangerous condition the spikes in the pole from which the intestate fell. Plaintiff's own medical witness, Holmes, testified that he did not know the causes of cancer, and that it was his belief that the medical profession does not know the causes of cancer. This witness treated deceased for syphilis, which he discovered by the so-called Wasserman test deceased was suffering from. He gave him a hypodermic injection of mercury for syphilis. Another of plaintiff's

medical witnesses, Dr. Reinhardt, testified that he made an autopsy on deceased's body; that he found a surgeon's incision on the left breast, which had healed, also an enlargement of the left testicle and of the heart, also chronic inflammation of the inner lining of the arteries of long standing; both lungs had little hard masses, from the size of a pea to that of a walnut; there were a dozen of them in the liver; the kidneys were enlarged and showed numerous scars on the outer surface; in his opinion death was caused by chronic myocaditis or changes in the arteries called endarteritis; that endarteritis is an inflammation of the lining of the arteries and may be produced by alcoholism, syphilis or rheumatism; the heart muscle was degenerated, partly from age, partly from chronic diseases; there was no evidence of external violence except of a surgical character, nor of a fall or accident.

Dr. Howland, a witness for plaintiff, who had treated deceased in his lifetime, was told by him that he had a venereal disease. This witness removed deceased's cancerous breast. This witness also testified that he knew nothing about the origin of cancer. Dr. Meyer, another medical witness for plaintiff, testified hypothetically and admitted on cross-examination that he did not know what caused cancer and never saw a cancer in the breast of a male; yet, notwithstanding this lack of knowledge regarding the causes of cancer, he did swear that he thought the cancer on deceased's breast was traceable to the injury.

Dr. Rolischer, also testifying hypothetically for plaintiff, notwithstanding he was the head of the cancer department of the Michael Reese Hospital, testified that no

one can tell the exact cause of cancer; that all that can be told is the probability of a connection; that the causes and origin of cancer are unknown to medical science.

Plaintiff's witness, Dr. Holmes, examined as a witness for defendant, testified that he had never heard of a case of cancer in the breast of a male caused by trauma. Dr. Small, examined as a witness for defendant, testified that he never knew of a case of cancer caused by trauma.

Aside from all this medical testimony there is much other testimony, including letters of deceased and his wife to some of the employees of defendant, which when considered with the medical testimony make it clear, we think, that no injury sustained by the deceased while working on defendant's telephone pole June 11, 1911, had anything whatever to do with the ailments which resulted in his death.

Plaintiff urges for reversal that the questions here involved are largely of fact, and to this contention we yield assent, but we cannot agree with the other contention that the decision to which the jury came is a finality. When this court upon due examination of the evidence concludes that the verdict and judgment are against the weight of the evidence and that the evidence is insufficient to support the verdict, it is the duty of this court to reverse the judgment. This duty is imposed by statute and supported by numerous decisions of this and the Supreme Court. The verdict in this case utterly lacks support in the evidence on the question of causal connection between the injuries suffered in the accident declared upon as happening June 11, 1911, and the death of plaintiff's intestate June 28, 1914, more than three years thereafter. The overwhelming weight of the

evidence is against the claim that the cancer from which deceased suffered and died was caused by the traumatic injury sustained by him on June 11, 1911. The verdict of the jury rests in surmise and conjecture. There is no evidence to support the causal connection between the injury declared upon and the ailments which resulted in the death of deceased more than three years thereafter. Moreover, the overpowering weight of the evidence demonstrates that the spike from which it is alleged the deceased fell was not in a condition of disrepair at the time nor was there a hole at the base of the spike, which spike it is contended bent under the weight of deceased, six inches in diameter, as testified to by the only witness produced by plaintiff who claims to have witnessed the occurrence. The testimony of this witness is utterly discredited by the evidence of many unimpeached witnesses. This pretended eye witness of the alleged accident is contradicted in several important particulars, and furthermore his story as told from the witness stand bore many evidences of improbability. It is at least significant that no claim against defendant was ever made by the deceased or by any one for him for compensation for this alleged accident; the first notice thereof received by defendant was the service of summons in this suit. While the wife of deceased wrote a letter to the company asking for financial assistance, such request made no mention of the accident counted upon in the declaration. We think Grim v. Clark Delivery Car Co., 189 Ill. App. 553, is particularly applicable to this case, where the court held that a preponderance of the evidence is not established by the testimony of one witness directly contradicted by two at least equally credible witnesses. Donaghue v. Scott, 141 ibid, 174; Hanley v. Chicago City Ry. Co., 180 ibid, 397.

The judgment of the Circuit Court is reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

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FINDINGS OF FACT.

The court finds as ultimate facts that there is no causal connection between the injuries suffered by plaintiff's intestate on June 11, 1911, and his death by cancer, which occurred June 28, 1914; and that defendant is not guilty of negligently causing the death of plaintiff's intestate, as charged in the declaration.

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1900-1901

The first of the series of lectures on the history of the United States was given by Mr. [Name] on the 1st of October. The lecture was very interesting and well attended. The second lecture was given by Mr. [Name] on the 8th of October. The lecture was also very interesting and well attended. The third lecture was given by Mr. [Name] on the 15th of October. The lecture was also very interesting and well attended. The fourth lecture was given by Mr. [Name] on the 22nd of October. The lecture was also very interesting and well attended. The fifth lecture was given by Mr. [Name] on the 29th of October. The lecture was also very interesting and well attended.

JULIUS ETTELSON and
ISAAC ETTELSON.

Appellants.

vs.

FRANK SONKOPF, FRANK
TRENTLER and BROVENS
NATIONAL BANK, Garnishees
and Intervening Petitioners,
Appellees.

210 I.A. 348

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

Charles J. Strauss sold the fixtures, utensils and a horse and wagon used by him in conducting a butcher shop in Chicago to Frank Trentler and Frank Sonkopp for \$400 and gave a bill of sale therefor dated September 30, 1916. There was paid \$50 in cash and the balance in notes secured by chattel mortgage from the purchasers upon the property described in the bill of sale. On October 17, 1916, the Ettelsons had judgment entered by confession in the municipal court against Charles J. Strauss for \$446 and costs. On the same day a garnishee summons was sued out in the same court by the Ettelsons against Trentler and Sonkopp and served upon them the next day. They answered that they had no property belonging to Strauss. It appeared that one Sigmund Adler took the Trentler and Sonkopp notes from Strauss by endorsement and discounted them at the Broverson National Bank, which bank filed its intervening petition claiming the value of the property in the hands of Trentler and Sonkopp garnished by the Ettelsons was due to it as holder of the notes secured by chattel mortgage on the property which Strauss sold to Trentler and Sonkopp by bill of sale.

On a trial before the court without a jury there was a finding in favor of the garnishees and they were dis

charged. Thereupon the court "upon the intervening petition of the Drovers National Bank as to the funds in the hands of the garnishee, found the issue in favor of said bank." The record then recites that "Thereupon the court rendered judgment in accordance with said findings * * and the plaintiff * * prayed and was allowed an appeal from said judgment to the Appellate Court * * upon filing two appeal bonds in the sum of \$200 each. * *" Two appeal bonds approved by the trial judge are found in the record, each in the penalty of \$200, one reciting an appeal from the judgment discharging the garnishees and the other an appeal from the judgment in favor of the intervenor, the Drovers National Bank.

The wife of Charles J. Strauss claims that the property conveyed by her husband and mortgaged back to him for part of the purchase price is exempt to the head of the Strauss family, and that as her husband has absconded she is the head of the family and entitled to claim the property as exempt. The sale by Strauss is also attacked as violating the so-called "Bulk Sales Law." If it were conceded that the property sold and mortgaged was exempt from sale on execution, that fact in no way prevented Strauss from making a sale thereof. The most that can be said (if the issue was in the case at all, which, in the conclusion at which we have arrived, it is not) is that the money arising from the sale might be claimed as exempt, but that could in no way arise here because Strauss was paid the purchase price of the so-called exempt property in money. It is clear that he could not have the property and the money also. If the property sold was exempt, such exemption on a sale of such property passed to the purchase money. So far as the "Bulk Sales Law" is involved, it is sufficient to say that it is not applicable to the instant case, because no merchandise was involved in

changed. Whereupon the court upon the intervening petition of the Drovers National Bank as to the time in the hands of the garnishee, found the same in favor of said bank. The record then recited that whereas the court rendered judgment in accordance with said petition - and the possibility of a prayer was allowed an appeal from said judgment to the Appellate Court - a writ of certiorari was issued in the sum of \$1000.00. The writ was issued to the trial judge who found in the record, and in the presence of \$200,000, the petition on appeal from the final judgment in the garnishee was the other as above from the judgment in favor of the intervenor, the Drovers National Bank. The writ of certiorari was issued to the court to properly convey by new motion and supporting facts and for part of the purchase price in equity to the said of the garnishee family, and that of said judgment was supported and is the head of the family and entitled to their property as exempt. The writ of certiorari is also attached as exhibiting the so-called "Bank Sales Law". It is well known that the property sold and conveyed and exempt from sale on execution that fact is no way protected known from which a writ of certiorari. The writ was issued to the court as to the case at all, which is the conclusion of which he have received, it is not to limit the money which from the sale might be claimed as exempt, but that could be no way arise have because it was said the purchase price of the so-called exempt property is money. It is clear that he could not have the property and the money paid. If the property sold was exempt, such exemption on a sale of such property passed to the purchase money. So far as the "Bank Sales Law" is involved, it is sufficient to say that it is not applicable

the sale. Larson v. Judd, 200 Ill. App. 420.

There is no evidence in the record showing who has possession of the mortgaged chattels. If the garnishees have it, they would be liable to the intervenor. If the intervenor has taken the property, as it may be assumed it might under the terms of its mortgage, then it was proper to discharge the garnishees. It is clear that plaintiffs could not recover against the garnishees, as their judgment was not a lien upon the personal property of Strauss until fifteen days after the date of the transfer and thirteen days after the recording of the chattel mortgage of the garnishees to Strauss; therefore the garnishees sustained by proof their answer that they had no property of Strauss in their possession and were not indebted to Strauss on any account.

The judgment discharging the garnishees was right.

The judgment in favor of the intervening petitioner while informal in form is not for that reason disputed by any of the parties, and we will therefore not disturb it.

There are two separate and distinct appeals found in this record, each separate and distinct from the other, and to be availed of here each should have been separately docketed in this court. In view of this condition we ought not to deal with these appeals in this manner, although in the interest of justice we have decided the rights of the parties as they appear from the record before us, and waiving the irregularity of these joint appeals, the judgments of the Municipal Court are affirmed.

JUDGMENTS AFFIRMED.

THE CASE: PARSON V. JUNG, Nov. 11, 1906, 200.

There is no evidence in the record showing who has possession of the mortgaged property. If the garnishee have it, they would be liable to the plaintiff. If the plaintiff has taken the property, as it was in default of right under the terms of the mortgage, then it was proper to discharge the garnishee. It is clear that plaintiff could not recover against the garnishee, as their judgment was not a lien upon the personal property of defendant until fifteen days after the date of the transfer and fifteen days after the recording of the chattel mortgage of the defendant to plaintiff. Therefore the garnishee retained no right in the property and they had no property of defendant in their possession and were not indebted to plaintiff on any account.

The judgment discharging the garnishee was right. The judgment in favor of the intervening plaintiff while interest in fact is not for that reason disposed of by the parties, and we will therefore not disturb it. There are two separate and distinct questions found in this record, each separate and distinct from the other, and to be decided of their own accord have been separately decided in this court. In view of this condition we ought not to deal with these appeals in this manner, although in the interest of justice we have decided the rights of the parties as they appear from the record before us, and leaving the integrity of these joint appeals, the judgments of the municipal court are

affirmed.

210 I.A. 358

UNITED VACUUM SWEEPER
COMPANY,

Appellant,

vs.

W. L. GROTH,

Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLMAN

DELIVERED THE OPINION OF THE COURT.

The chancellor after sustaining a general demurrer to the bill as amended dismissed the same for want of equity and complainant brings the record for review by appeal.

Complainant is a corporation chartered by the State of Delaware and licensed to carry on its corporate affairs in Illinois, with its principal office in the city of Chicago. It manufactures and sells vacuum sweepers. The Hugro Manufacturing Company, an Illinois corporation, of which defendant was secretary and treasurer and a director, was at the time of making the contract hereinafter referred to a business competitor of complainant, with its factory in Warsaw, Indiana, and its principal office in the city of Chicago.

November 17, 1916, complainant, Burrell D. Jones and W. T. Wright entered into a contract with the defendant for the purchase by complainant from defendant of 343-3/4 shares of the capital stock of the Hugro Manufacturing Company in exchange for 2000 shares of the capital stock of the complainant company, Jones and Wright being parties to the contract in behalf of and for the sole benefit of complainant. Among other things it was ^{by} said

2101 A. 328

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UNITED STATES
DEPARTMENT OF JUSTICE

AT

IN

IN RE: [illegible]

[illegible]

Two defendants have been charged with
conspiracy to defraud the public and
to obtain money by means of a
scheme and artifice.

by [illegible]

Complaint is a conspiracy entered by the
State of Illinois and alleged to have been
entered in Illinois, with the principal office in the
city of Chicago. It was entered and held under
the name of [illegible] Company, an Illinois
corporation, of which defendant and secretary and treasurer
and a director, was at the time of entering the complaint
unincorporated, but is a corporation registered in some
jurisdiction, with the factory in Chicago, Illinois, and the
principal office in the city of Chicago.

Between the first complaint, [illegible]
James and J. P. [illegible] entered into a contract with the
defendant for the purchase of complaint from defendant
of \$25-25 shares of the capital stock of the [illegible]
[illegible] company in exchange for \$250 shares of the [illegible]
[illegible] at the [illegible] company, [illegible] and [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

contract provided that defendant should be elected a director, secretary and treasurer of complainant company. Jones and Wright agreed to protect defendant against any liability which he may have incurred to the Hugro Company while acting as its secretary and treasurer, such liability to be assumed by complainant. It was further agreed that the Hugro stock should be, when transferred to complainant, held by it and not transferred on the Hugro company books until such time as it was deemed necessary to do so, because it was the intention of Wright, Jones, and defendant that defendant was to stay on the board of directors and represent complainant in the Hugro company; that when defendant left the Hugro Company he was to come into complainant company and assume the duties of the offices named; and it is further recited that "Messrs. Wright and Jones are desirous of having Mr. Groth remain with the Hugro company until a majority of the Hugro company stock had been obtained, and that the same shall be regarded as confidential between the three of them."

The bill as amended after reciting the facts and averring the refusal of defendant to carry out the contract and deliver the stock as agreed in the contract prays for a specific performance of the contract by defendant and that he be decreed to transfer and deliver the 343-3/4 shares of stock of the Hugro company to complainant.

It appears from the averments of the bill that defendant was a director and secretary and treasurer of the Hugro company and while acting as such was made a director and secretary and treasurer of complainant company.

The averments of the amended bill are under the laws of this State self-condemnatory, and the contract appended to the bill as amended is clearly contrary to the public policy of this State as oftentimes announced by its

[illegible]

Supreme Court. Defendant, if he had lived up to the letter of the contract and performed the covenants on his part undertaken, would have in a sinuous and deceitful way undermined the Hugro Company, contrary to the fealty incumbent upon him as its most effective servant, holding three of its principal offices, the lawful discharge of the functions of which offices required him to faithfully serve it in all proper ways for its advantage and continuance as a corporation in the business which its charter empowered it to conduct. In a secret manner defendant was by the contract in the record obligated to so manage the internal affairs of the Hugro Company and to so deceive his fellow stockholders who had entrusted him with the management of its affairs as to procure control of a majority of its stock and cause it to be merged in and amalgamated with the complainant company. Defendant refusing to carry out the terms of his contract with complainant and to surrender the Hugro Company to it, complainant attempts in this proceeding to compel defendant to specifically perform the same through the aid of a court of equity.

Complainant urges that because its charter granted by the State of Delaware gives it power and authority to purchase and acquire stock from other corporations and it is licensed to do business in this State, it therefore has a right to acquire and own stock in a corporation of this State. We are not able to find any decision in this State which upholds this contention. Golden v. Cervenka, 278 Ill. 409, holds squarely to the contrary; in that case the court said inter alia:

"A domestic corporation is not authorized to hold stock in another corporation, and a foreign corporation can exercise no powers in this State which cannot be lawfully exercised by a domestic corporation. * * Therefore the license to John Burnham & Co. did not authorize

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that corporation to buy, sell or hold in the State of Illinois stock in another corporation. The purchase of such stock and its transfer to John Burnham & Co. were ultra vires and void."

Dunbar v. American Telephone and Telegraph Co., 238 Ill. 456;

Converse v. Emerson, Talcott & Co., 248 Ill. 618.

By parity of reasoning, the contract of complainant with defendant, which had for its main object the acquiring by complainant of stock of the Hugro Company and the ultimate merging of the Hugro Company into the complainant company, was beyond the powers of complainant, ultra vires and void. First National Bank v. Converse, 200 U. S. 425; California Bank v. Kennedy, 167 U. S. 362.

The public policy of this State will not permit the control of one corporation by another, and it is patent that the object of the contract found in the record was dual, - first, to eliminate the Hugro Company as a competitor of complainant, and, second, to enable complainant to acquire its business and property. The attempt so to do was a fraud upon the stockholders of the Hugro Company, who were not parties to that contract. As said in Marble Co. v. Harvey, 92 Tenn. 115:

"The purpose and intent in granting a charter is, that the corporation shall carry on its business through its own agents, and not through the agency of another corporation. The public policy of this State will not permit the control of one corporation by another. Especially is this true when a foreign corporation thus undertakes to control and swallow up a domestic company. Such control of one corporation by another in a like business is unlawful, as tending to monopoly.

The result is, that this purchase of shares for the express object of controlling and managing another corporation was ultra vires and, therefore, unlawful and void. Being void, it was of no legal effect, and no rights result from it enforceable by or through the Courts of the State, when such aid is invoked in furtherance of the unlawful agreement."

It was found that the above information was not correct and that the information was not correct and that the information was not correct.

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the company, was beyond the power of concealment. After this definite warning of the House, however, it is certain that the company was not only aware of the danger but was endeavoring by concealment to escape it. The House therefore had abundant cause to believe that the company was endeavoring to conceal the facts from the public and to keep the same from the knowledge of the House.

W. B. E. 448; California Bank v. Bank of America, 187 U.S. 294.

Figure 13: The effect of the 30-year average of the

The number of all the employees of the company was 70 persons.

"I wish you would call at my apartment and see the lovely old girl."

[illegible]

graves of individuals killed at Bataan, Luzon, Philippines
and a few of the soldiers who survived the massacre at

and after the 1960s, there was a significant increase in the number of people who were employed in the service sector of the economy.

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1011 1110 102

Indication of date, time, and location for sighting report

1. That the corporation shall come to the aid of the Government in the event of a national emergency, and shall be subject to the control of the Government in the event of a national emergency.

[illegible]

The foregoing is recited in Dunbar v. American Telephone and Telegraph Co., supra, and is pertinently applicable to the instant case.

Complainant also seeks to enforce the contract under the doctrine that defendant is estopped from availing of its unlawful character. Suffice it to say in answer to this that it is a familiar doctrine that estoppel cannot be invoked to enforce an illegal act. Contracts which are ultra vires and unlawful cannot be enforced and the doctrine of estoppel cannot be applied on the ground that the party against whom it is sought to enforce such contract has received the benefits of it. Such a contract cannot be ratified by either party, because it could not have been authorized by either. Calumet, etc. Rock Co. v. Henkle, 273 Ill. 318; Mercantile Trust Co. v. Foster, 275 Ill. 332.

The contract sought to be specifically enforced in this action is ultra vires the powers of the complainant company unlawful in its terms and therefore void, and the amended bill in which is sought a specific performance of such contract was obnoxious to the general demurrer interposed against it; therefore the ruling of the learned Chancellor sustaining such demurrer was without error and the decree of the Circuit Court is affirmed.

AFFIRMED.

CARYL C. CLARKE et al., minors, etc.,
Appellees,

vs.

NATIONAL COUNCIL OF THE KNIGHTS
AND LADIES OF SECURITY,
Appellant.

210 I.A. 360

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

Plaintiffs had judgment for \$2548.98 upon the verdict of a jury and defendant appeals.

The action is based on a benefit certificate of the defendant society insuring the life of William George Clarke in the sum of \$2,000 less certain specified deductions. The policy is dated September 30, 1907, and Clarke died May 26, 1910, thereafter, and this suit is brought by those beneficially interested in the policy. The declaration declared upon the policy, to which the defendant pleaded the general issue and twelve special pleas; plaintiffs, procuring leave to reply double, advantaged of such leave by filing many replications to these pleas. As the pleadings are not in dispute we shall not further notice them.

On the trial defendant withdrew the plea of the general issue and proceeded to put in its affirmative defenses, which plaintiffs made what we have concluded was an ineffective attempt to rebut.

The insured in his application for membership was asked and answered the following questions:

"24. Do you drink wine, spirits, or malt liquors, daily or habitually? No.

26. Have you ever been addicted to the excessive or intemperate use of these liquors? If so, when? No."

066.41012

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and on 22.8.64 and 20.9.64 for official

...alleged contact with the FBI, as to whether

the solution is correct as a matter of principle.

and 1110 to 1115 and 1120 to 1125, respectively, and 1130 to 1135 and 1140 to 1145, respectively.

George Latta is the son of 1,000 Year certain 1911-1912.

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2019-2020, 2020-2021, 2021-2022, 2022-2023, 2023-2024, 2024-2025, 2025-2026, 2026-2027, 2027-2028, 2028-2029, 2029-2030, 2030-2031, 2031-2032, 2032-2033, 2033-2034, 2034-2035, 2035-2036, 2036-2037, 2037-2038, 2038-2039, 2039-2040, 2040-2041, 2041-2042, 2042-2043, 2043-2044, 2044-2045, 2045-2046, 2046-2047, 2047-2048, 2048-2049, 2049-2050, 2050-2051, 2051-2052, 2052-2053, 2053-2054, 2054-2055, 2055-2056, 2056-2057, 2057-2058, 2058-2059, 2059-2060, 2060-2061, 2061-2062, 2062-2063, 2063-2064, 2064-2065, 2065-2066, 2066-2067, 2067-2068, 2068-2069, 2069-2070, 2070-2071, 2071-2072, 2072-2073, 2073-2074, 2074-2075, 2075-2076, 2076-2077, 2077-2078, 2078-2079, 2079-2080, 2080-2081, 2081-2082, 2082-2083, 2083-2084, 2084-2085, 2085-2086, 2086-2087, 2087-2088, 2088-2089, 2089-2090, 2090-2091, 2091-2092, 2092-2093, 2093-2094, 2094-2095, 2095-2096, 2096-2097, 2097-2098, 2098-2099, 2099-2100, 2100-2101, 2101-2102, 2102-2103, 2103-2104, 2104-2105, 2105-2106, 2106-2107, 2107-2108, 2108-2109, 2109-2110, 2110-2111, 2111-2112, 2112-2113, 2113-2114, 2114-2115, 2115-2116, 2116-2117, 2117-2118, 2118-2119, 2119-2120, 2120-2121, 2121-2122, 2122-2123, 2123-2124, 2124-2125, 2125-2126, 2126-2127, 2127-2128, 2128-2129, 2129-2130, 2130-2131, 2131-2132, 2132-2133, 2133-2134, 2134-2135, 2135-2136, 2136-2137, 2137-2138, 2138-2139, 2139-2140, 2140-2141, 2141-2142, 2142-2143, 2143-2144, 2144-2145, 2145-2146, 2146-2147, 2147-2148, 2148-2149, 2149-2150, 2150-2151, 2151-2152, 2152-2153, 2153-2154, 2154-2155, 2155-2156, 2156-2157, 2157-2158, 2158-2159, 2159-2160, 2160-2161, 2161-2162, 2162-2163, 2163-2164, 2164-2165, 2165-2166, 2166-2167, 2167-2168, 2168-2169, 2169-2170, 2170-2171, 2171-2172, 2172-2173, 2173-2174, 2174-2175, 2175-2176, 2176-2177, 2177-2178, 2178-2179, 2179-2180, 2180-2181, 2181-2182, 2182-2183, 2183-2184, 2184-2185, 2185-2186, 2186-2187, 2187-2188, 2188-2189, 2189-2190, 2190-2191, 2191-2192, 2192-2193, 2193-2194, 2194-2195, 2195-2196, 2196-2197, 2197-2198, 2198-2199, 2199-2200, 2200-2201, 2201-2202, 2202-2203, 2203-2204, 2204-2205, 2205-2206, 2206-2207, 2207-2208, 2208-2209, 2209-2210, 2210-2211, 2211-2212, 2212-2213, 2213-2214, 2214-2215, 2215-2216, 2216-2217, 2217-2218, 2218-2219, 2219-2220, 2220-2221, 2221-2222, 2222-2223, 2223-2224, 2224-2225, 2225-2226, 2226-2227, 2227-2228, 2228-2229, 2229-2230, 2230-2231, 2231-2232, 2232-2233, 2233-2234, 2234-2235, 2235-2236, 2236-2237, 2237-2238, 2238-2239, 2239-2240, 2240-2241, 2241-2242, 2242-2243, 2243-2244, 2244-2245, 2245-2246, 2246-2247, 2247-2248, 2248-2249, 2249-2250, 2250-2251, 2251-2252, 2252-2253, 2253-2254, 2254-2255, 2255-2256, 2256-2257, 2257-2258, 2258-2259, 2259-2260, 2260-2261, 2261-2262, 2262-2263, 2263-2264, 2264-2265, 2265-2266, 2266-2267, 2267-2268, 2268-2269, 2269-2270, 2270-2271, 2271-2272, 2272-2273, 2273-2274, 2274-2275, 2275-2276, 2276-2277, 2277-2278, 2278-2279, 2279-2280, 2280-2281, 2281-2282, 2282-2283, 2283-2284, 2284-2285, 2285-2286, 2286-2287, 2287-2288, 2288-2289, 2289-2290, 2290-2291, 2291-2292, 2292-2293, 2293-2294, 2294-2295, 2295-2296, 2296-2297, 2297-2298, 2298-2299, 2299-2300, 2300-2301, 2301-2302, 2302-2303, 2303-2304, 2304-2305, 2305-2306, 2306-2307, 2307-2308, 2308-2309, 2309-2310, 2310-2311, 2311-2312, 2312-2313, 2313-2314, 2314-2315, 2315-2316, 2316-2317, 2317-2318, 2318-2319, 2319-2320, 2320-2321, 2321-2322, 2322-2323, 2323-2324, 2324-2325, 2325-2326, 2326-2327, 2327-2328, 2328-2329, 2329-2330, 2330-2331, 2331-2332, 2332-2333, 2333-2334, 2334-2335, 2335-2336, 2336-2337, 2337-2338, 2338-2339, 2339-2340, 2340-2341, 2341-2342, 2342-2343, 2343-2344, 2344-2345, 2345-2346, 2346-2347, 2347-2348, 2348-2349, 2349-2350, 2350-2351, 2351-2352, 2352-2353, 2353-2354, 2354-2355, 2355-2356, 2356-2357, 2357-2358, 2358-2359, 2359-2360, 2360-2361, 2361-2362, 2362-2363, 2363-2364, 2364-2365, 2365-2366, 2366-2367, 2367-2368, 2368-2369, 2369-2370, 2370-2371, 2371-2372, 2372-2373, 2373-2374, 2374-2375, 2375-2376, 2376-2377, 2377-2378, 2378-2379, 2379-2380, 2380-2381, 2381-2382, 2382-2383, 2383-2384, 2384-2385, 2385-2386, 2386-2387, 2387-2388, 2388-2389, 2389-2390, 2390-2391, 23

Presented by the Department of the Interior, Bureau of Land Management, Washington, D.C.

The location of the site and the proposed installation are

doi:10.1017/S0022292410000537

Received 14 November 1999; accepted 17 May 2000

100-443887-100

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to make sure that the information is not lost.

the general tone and character of the report.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

an ineffective attempt to report.

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There have been no other reports of this type of activity in the area.

This application was signed by the insured and contained the following certificate:

"I hereby certify that I am temperate in my habits and am in sound physical and mental condition, and that I am a fit subject for life insurance."

Insured further declared that his answers and statements in the application were true and so warranted them and agreed that such answers and statements should form the basis of his agreement with the order, and agreed if accepted as a member to faithfully abide by all its laws, rules and regulations then or thereafter enacted.

The membership certificate on which this action is founded contains the following condition:

"If the member holding this certificate shall ** become intemperate in the use of alcoholic drinks * * then this certificate shall be null and void", etc.

The by-laws of defendant society were offered in evidence and contained among other conditions the following:

"Sec. 82. * * * If any member of this Society heretofore or hereafter admitted shall become intemperate in the use of intoxicating liquors, * * or if his death shall result directly or indirectly from the intemperate use of intoxicating liquors * * then the beneficiary certificate held by said member shall become, and be, absolutely null and void. * * *

"Sec. 86. No member or beneficiary named in his certificate shall participate in or be entitled to be paid any sum from the beneficiary fund of this Order * * * who may die from the intemperate use of intoxicating liquors * * or who, in application for beneficiary membership, has given false answers regarding his * * physical or mental condition.

"Sec. 88. No person nor the beneficiaries named in his Beneficiary Certificate, who shall make false representations in his application for membership * * or who shall conceal any of his personal habits that are a violation of the laws of the Order, shall be entitled to receive any benefits by reason of a Beneficiary Certificate having been issued to him."

The evidence overwhelmingly establishes the fact that the insured was intemperate and habitually overindulged in the use of intoxicating liquors for some time before his application for membership and that he died thereafter of

chronic alcoholism. The insured was a lawyer and at one time a minister of the Gospel, neither of which occupations seemed to have had the effect of deterring his habitual and immoderate indulgence in alcoholic beverages. Knowledge of the habits of the insured in this regard was material to the defendant society, so that it might therefrom judge of his acceptability or otherwise as an insurable risk.

Whether or not his statements regarding his habits in this regard were warranties or representations is of little moment if they were material, which we hold they were. If they were false the certificate would be null and void under its conditions and the by-laws of the society by which he had agreed to be bound. Continental Life Ins. Co. v. Rogers, 119 Ill. 476; Crosse v. Supreme Lodge E. A. L. of M., 254 *ibid* 80; Wright v. National Council E. A. L. of M., 253 *ibid* 460; Facey v. National Council, 172 Ill. App. 51.

In the light of the proofs regarding the habit of inebriety of the insured, the attempt to prove in rebuttal a waiver by the society in this regard failed. The insured had a long record of habitual inebriety. His medical attendant from August, 1906, to the time of the insured's death established by his testimony found in the record the fact that insured was habitually addicted to the use of intoxicating liquors prior to and at the time he made his application for the membership certificate in suit, and that such habits continued for the remainder of his mortal life, finally resulting in his death. This condition is not seriously controverted by any affirmative proof. There is much negative testimony regarding the insured's claimed sobriety, which is of no probative value in view of the cogent facts testified to by his medical adviser and other witnesses

of probity, in which the drinking habits of the insured are categorically related; especially is this apparent when it is borne in mind that the insured yielded readily to treatment and often quickly recovered from serious conditions of intoxication.

His regular medical attendant testified among other things that he treated him on August 30, 1906, for drunkenness; that at that time he was under treatment for two days; that he never treated him for anything else but drunkenness; that the insured would drink until he would be sick at his stomach and until physically unable to get around; that he gave him treatment to eliminate alcohol from his system and sedatives for his nervous system; that he was very responsive to treatment; that he was really a wonderful man physically and mentally; that he was in splendid health at times and there was nothing the matter with him but drunkenness; that the witness again treated him on September 5th and 6th, 1906, for alcoholism; that he was so intoxicated that he needed medical care; that he never had a doctor until he was absolutely "down and out" and until he was so drunk he could not take care of himself; that May 21st and 22nd, 1907, and July 3rd and 4th, 1907, he treated him for alcoholism; that July 25, 1907, at Geneva Lake, Wisconsin, he treated him for drunkenness and brought him home to Chicago and stayed with him one day and one night and sobered him up; that August 24th, 25th and 26th, 1907, he took him down to Louisiana to get him away from his habits and to "straighten him out"; that he was very drunk when he was taken away - not able to take care of himself or fit to walk; that October 22, 1907, he was drunk and was given the usual treatment;

that on October 30, November 1st and 2nd, 1907, March 4th, 8th, 14th, 15th and 23rd, May 13th and 14th, and July 23th, 26th, 27th, 28th, 29th and 30th, 1908, witness gave insured treatments for alcoholism; that the treatments in July, 1908, were given at the People's Institute and in the insured's own rooms; that he treated him June 25th and 30th, 1908, for alcoholism and a slight renal irritation of the kidneys; that excessive use of drink was the cause of this irritation. This witness also testified that at the time insured was taken to the Garfield Park Sanitarium he had been drinking for so many years that it had begun to tell on him and that he had broken himself down considerably and could not stand as much drink; that his general organic tone was lower and required more stimulation all the time; that in June, 1908, he had delerium tremens; that he also had delerium tremens when he was treated at Lake Geneva; that on March 11th, 25th and 31st, 1910, he treated him for alcoholism; that on April 2nd and 3rd, 1910, he treated him for the same trouble; that on both days he was drunk; that on May 24th, 1910, he saw him for the last time in consultation with another doctor; that he was then suffering from chronic alcoholism and died therefrom two days thereafter. This witness also treated the insured almost continuously from the first treatment testified to till the insured's death. The insured, this witness further testified, had a low grade of nephritis as early as 1908; that while it never developed to any serious extent, what he had was caused by the excessive use of alcohol; that when the insured was sober his nephritis would disappear. This medical attendant testified that the insured started his alcoholic habit by drinking "Bishop's beer." From this he progressed to "Malt Marrow" and that after 1906 he used whiskey freely to

the time of his death. The insured was so fond of whiskey that he instructed this medical witness not to give him anything that would discourage the habit.

Dr. Rice, a witness for plaintiffs, testified that he had stated in the death certificate that alcohol might have been a contributory cause. A dentist, a friend of the insured, who saw him every day he was in Chicago from 1906 to 1910, testified that he had seen the insured intoxicated many times and knew of his calling a doctor to treat him for excessive drinking; that he bought whiskey by the case which he drank openly in his office; that he had known him to drink as much as a quart of whiskey in less than a day, and had seen him so intoxicated that he could not walk; that he one time helped carry him from his office to his room when intoxicated; that he had seen him when he was suffering from delirium tremens; that he had talked with him about drinking, and that he said he did not care how much he drank or how long he lived - saying this when sober.

Three witnesses in Chicago testified on behalf of plaintiff that they had never seen the insured intoxicated, and thirteen business men and citizens at Westrop, Louisiana, several miles from insured's plantation, testified that they had never seen him drink intoxicating liquors nor intoxicated, though some of them "had seen him drink, but not to excess." It seems that when the insured went to his plantation in Louisiana he did it for recuperative purposes and was sober most of the time he was there. Another witness, a woman, testified that while she did not personally know the insured, she had seen him, but never saw him intoxicated, never saw him drinking, never thought he got drunk, but did hear that he drank; that she went once to see him about lock-

1. The following information was obtained from the files of the
2. Federal Bureau of Investigation, Washington, D. C., on the
3. subject of the above captioned case, and is being furnished
4. to you for your information and use.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

ers for the lodge room and he acted strangely; that someone remarked, "Well, he must have had something to drink."

Another witness for plaintiffs testified that she never saw the insured intoxicated or staggering, but that at one time he did not seem like a man in a normal condition; that she would see him twice or three times a month and then again would not see him for several months; that she saw him when he did not appear to be normal, but was under the impression he was addicted to the use of drugs; that there were rumors about his drinking; that her opinion was that he was more likely addicted to the use of a drug; that she was impressed with the idea that the insured was mentally unbalanced rather than drunk.

In the light of the proofs it is evident that the answers regarding his habit of drinking in the application of the insured for membership were false; and from the evidence we find that after the certificate of membership was issued to the insured he violated its conditions and the by-laws of the society in his habit of drinking; that he habitually drank to excess both before the date of the certificate and thereafter to the time of his death; that the false answers in the application vitiated the certificate, and that his continued violation of its conditions and of the by-laws of the society in his habit of drinking to excess nullified it.

The verdict is clearly contrary to the greater weight of the evidence. The verdict should have been for the defendant. Therefore the judgment of the Circuit Court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

540 - 23885

FINDING OF FACTS.

The court finds as ultimate facts that the answers of the insured in his application for membership in the defendant society regarding his habit of indulging in alcoholic stimulants were false and were known by him to be false when made; that such answers were material to the life insurance risk which the certificate of membership in the society carried and which certificate is the one in suit; that the insured violated the conditions of the membership certificate and the by-laws of the society by indulging habitually in the intemperate use of alcoholic liquor from the date of such certificate to the time of his death, and that the insured died as the result of chronic alcoholism.

GUSTAVE ALBRECHT,
Appellee.

vs.

AUDITORIUM LYCEUM AND
CHAUTAQUA ASSOCIATION,
a corporation, THEODORE
TURNQUIST, EDNA R. SEVER-
INGHAM and AUDITORIUM SCHOOL OF
LYCEUM ARTS, a corporation,
Appellants.

210 I.A. 362

INTERLOCUTORY APPEAL,
CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE HOLDEN

DELIVERED THE OPINION OF THE COURT.

The Circuit court by order entered on the motion of complainant appointed a receiver for the defendant Auditorium Lyceum and Chautauqua Association, from which order this appeal is prosecuted. The bill is in the nature of a creditor's bill to enforce payment of a judgment against the Association, an execution upon which judgment had been returned nulla bona.

It is argued for reversal that it was incumbent upon the chancellor as a condition of the receiver's appointment to require complainant to give a bond with sufficient penalty, unless the court upon good cause shown upon notice and full hearing shall be of the opinion that a receiver should be appointed without bond. Sec. 53, chap. 22 R. S.

David H. Grant was appointed receiver upon giving a bond as such receiver in the penalty of \$5,000. The order does not require complainant to give bond, nor is there an opinion of the court expressed in the order that a receiver ought to be appointed without such bond.

Defendants argue that Walker v. Kersten, 115 Ill. App. 130, is authority that a failure to require com-

208.A.1018

THE SECRETARY OF THE
TREASURY
WASHINGTON, D.C.

UNITED STATES
DEPARTMENT OF THE
TREASURY
WASHINGTON, D.C.
JAN 10 1918

THE SECRETARY OF THE
TREASURY

For the purpose of the
provision of the
act of March 3, 1879,
the Secretary of the
Treasury is authorized
to issue the following
provisions:

1. The Secretary of the
Treasury is authorized
to issue the following
provisions:

2. The Secretary of the
Treasury is authorized
to issue the following
provisions:

plainant to give bond as required by statute will not work a reversal of the order where the record shows that on the merits of the case it is a cause proper for the appointment of such receiver. If it is, it has since been overruled by both this and the Supreme Court in subsequent decisions. Since the Walker case the writer of this opinion has in three other cases written opinions holding that compliance with the statute regarding giving bond by complainant is a sine qui non to the court's power to appoint a receiver, unless by the order itself the giving of such a bond is dispensed with. Watson v. Gudney, 144 Ill. App. 634; Ayres v. Graham Steamship Co., 150 *ibid* 137; Gibberman v. Etangel, et al., Gen. No. 23459, not yet reported. To the same effect are Schoeneke v. Chicago Title & Trust Co., 178 *ibid*, 387, and cases there cited.

These decisions are fortified by the ruling in Rice v. McJohn, 244 Ill. 264, in which a receiver was appointed without requiring the complainant to give the bond as provided by statute, and the court said:

"Had this been a proper case for the appointment of a receiver, it would be error to make the appointment without bond except for good cause shown. * * (Hurd's Stat. 1903, chap. 23, sec. 53.)"

Complainant contends that the bond on appeal is not in compliance with the rules of the Circuit court, and for that reason asks that the appeal be dismissed.

In the first place, the bond is in proper form and is approved by the court. Whether the party giving the bond had complied with the rules of the court is a matter for the consideration of the court to whom the bond was presented and by whom it was approved. Furthermore, the rules of the Circuit Court are not found in the record. From their absence we will assume that the rules relating

plaintiff to give such an affidavit by which it will not work
necessity of the order where the record shows that the
notice of the case is a notice given for the plaintiff
it was received. It is not, it has never been received by

the plaintiff and the defendant (and it is admitted that the
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to the giving of such bond were complied with to the satisfaction of the presiding judge. Revis v. North Western, 170 Ill. 595.

For the errors indicated the interlocutory order appealed from is reversed.

ORDER REVERSED.

It is found in the same place as the other
specimens of the same species. It is
very similar to the other specimens.
The only difference is in the color.

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210 I.A. 363

E. M. BULKLEY et al., doing
business as Spencer Trask & Company,
Appellants,

vs.

THE NORTHERN TRUST COMPANY,
as Executor, etc., of E. A.
Salmstein, deceased,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiffs, engaged as partners in a stock, bond and investment brokerage business under the firm name of Spencer Trask & Company, brought suit in the Municipal court against the defendant corporation as executor, etc., of E. A. Salmstein, deceased. The judgment of the trial court was in favor of the defendant and the plaintiffs bring the case here by appeal for review.

On July 16, 1916, Salmstein, deceased, gave plaintiffs an order, effective until executed, to sell 45 shares of the capital stock of the Standard Oil Company of California at \$275 per share. Plaintiffs sold the stock in question on September 6, 1916, about 10 o'clock in the morning. The sale of the stock was had in New York and plaintiffs notified their Chicago office of the sale within fifteen minutes after it was made. Plaintiffs' Chicago office immediately notified the office formerly operated by deceased of the sale and was informed that Salmstein had died about one o'clock on the morning of September 6, 1916, about nine or ten hours before the order to sell the stock was executed in New York.

The single question before us is, was the authority to purchase the stock in question revoked by the death of Salmstein? We think it was. It seems to be con-

ceded that the plaintiffs had no knowledge of Salamein's death at the time the stock was sold. The sale of the stock was executed in accordance with the rules and customs of what is called the New York curb market.

It may be conceded, as urged by counsel for plaintiffs, that the rule that the death of a principal revokes all agencies created by him, is subject to exceptions, and that, in particular, such exceptions apply where an agency is "coupled with an interest." In support of their argument counsel rely upon the case of Glennan v. Rochester Trust & Safe Deposit Co., 200 N. Y. 12. In that case it was held that the death of a drawer of a check did not revoke the written authority of the bank to pay the check. In deciding the case the court said:

"The rule that denies protection to persons dealing with an agent after the death of the principal, though in good faith and without knowledge of that fact, is an inherited one. In the Wilson case it was declared by this court to be a harsh one, but the court felt that it had been too firmly established in this state to be disturbed by judicial decision, though it recommended a change by the legislature, to place the law in harmony with the more enlightened views of the present time and to promote the interests of justice. The same reason which there constrained the court to give effect to the rule, despite its disapproval of it, should also impel us to hold the rule inapplicable to bank checks. If there appeared that the doctrine of the common law had prevailed too long to be disregarded; it also appears almost equally clearly that the common-law doctrine has never prevailed as to checks."

It is evident that the court that rendered this decision, because of the harsh results which would follow from a strict application of the rule, was moved by the necessities of the case rather than by precedent. The court held that -

"It would be utterly impracticable for business to be done if, before a bank could safely pay checks, it must delay to find out whether the drawer is still living."

We are not inclined to disagree with the New

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive one.

It is further noted that the above information was obtained from the records of the State Department and is not to be used for any other purpose than that for which it was obtained.

7

RECEIVED THE FOLLOWING INFORMATION ON JUNE 10:

A PERSONS WHO WOULD HAVE BEEN A MEMBER OF THE
-AND THAT IS KNOWN TO BE IN CONTACT WITH THE

York court, but we doubt that the exceptions to the rule should be extended to include cases such as the one at bar. The contract here under consideration merely provided for the performance of a service to be rendered on the happening of an uncertain event. It involved a standing order to sell stock belonging to deceased and we can see no reason why this common form of executory contract should be regarded as an exception to the general rule. While it is true that the general rule of law protects third persons who have dealt with an agent, the law does charge such persons with knowledge of the fact that the agent's authority is revoked by the death of his principal. Quite clearly this rule operates with great harshness in many cases, but this fact in and of itself does not empower the courts to amend or modify it.

Hess v. Rau, 95 N. Y. 359.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

JAMES H. HILLS,
Appellant,

vs.

JOSEPH HOPP,
Appellee.

210 I.A. 365

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of the defendant. By stipulation of the parties the case was consolidated for hearing with the cases numbered in this court 23773, 23774, 23775, 23776 and 23967.

Plaintiff, James H. Hills, on September 6, 1912, purchased one hundred and twenty shares of the capital stock of the Standard Theatres Company from defendant, Joseph Hopp, paying therefor the sum of twelve hundred dollars. The case was tried by the court without a jury. The trial court found that the plaintiff had purchased the stock in question from the defendant, Joseph Hopp; that Hopp promised plaintiff before he purchased the stock that he would repurchase the same from him at any time that plaintiff might become dissatisfied with the purchase; that defendant had stated at a meeting, held in December, 1912, to prospective stockholders present at the meeting that if any one or more of them should purchase shares of stock in the company and should afterwards become dissatisfied "he would purchase their stock of them and pay the amount of the par value thereof, or the amount paid therefor by them respectively;" that each of the plaintiffs, being the plaintiff in the case at bar and those in the cases heretofore referred to, except plaintiff Annie Jahr,

were present at the meeting and heard defendant Hopp make the foregoing statements; that defendant made substantially the same statements to Samie Jahr on January 15, 1913; that the plaintiff Hills, and plaintiffs in the other cases referred to, purchased the shares of stock referred to in the several cases after defendant had made said statements; that defendant was a stockholder and interested in the Standard Theatres Company on, before and after said statements were made, and was in December, 1912, president of that company.

The trial judge made other findings of fact to the effect that Hopp, defendant, in September, 1912, had subscribed for 1020 shares of stock of the company, subscribing first for 450 and on a later date for 570 shares and that he held such shares in December, 1912; that Hopp never paid for the 570 shares of stock and that there was due and unpaid thereon at the time of the trial the sum of \$5,500; that the assets of the company in December, 1912, were \$4200 and on January 15, 1913, were not less than \$9,000 nor more than \$9,500; that the company while plaintiffs were stockholders thereof, was the owner of the Liberty Theatre; that in the year of 1914 "in some manner" the title to the theatre was transferred to Hopp. Other findings were made by the trial judge which it will not be necessary to refer to here.

An examination of the record discloses that the defendant held out to the plaintiff that he, defendant, was in the film business, that he would furnish films at cost prices to the company, which was organized to conduct a moving picture business; that he did not want to procure money from the banks; that it was his desire to help people of moderate means; that investment in the shares

[illegible]

of stock of the company was sure to be profitable; that he was so certain of this that if plaintiff should purchase stock in the company, he, defendant, would take back the stock at any time that plaintiff became dissatisfied with his purchase.

The trial court refused to find, as a matter of law, that the contract entered into between the parties was not unilateral and that it was not lacking in mutuality. The court found the material facts of the case as contended for by the plaintiff, and such being the case, we think that the trial judge should have held that the contract in question was not unilateral and that it was not lacking in mutuality. The contract in question was fully executed on the part of the plaintiff, and as stated, it was made with and for the benefit of the defendant. The case of Ruzicka v. Lau, No. 23286, decided by this court on October 3, 1917, is in most important respects like the instant case, and it was there held that the plaintiff, having fulfilled his part of the contract in good faith and the contract being fully executed on his part, it became the legal duty of the defendant to comply with his promise to repurchase certain stock which he had sold to the plaintiff. Murray v. Burgess, 304 Ill. 482.

The evidence warrants the conclusion that the stock which was sold by defendant to plaintiff, while the transfer was nominally from the company to the plaintiff, was in fact a sale of shares of stock for the benefit of the defendant. The contract between plaintiff and defendant was not one as to which it can be said that defendant had merely expressed an intention to repurchase the stock, or that his language is to be regarded as a mere "puffing" of the company's business. The promise made by defendant, if

the testimony of the witnesses for plaintiff be true, was that defendant would pay back to plaintiff the full amount which plaintiff had paid for the stock if ^{at} any time the plaintiff became dissatisfied with his purchase. We think that the evidence shows ample consideration for these premises. The defendant was an original subscriber for 1000 shares of the 1500 shares of the capital stock of the company. He subscribed for this stock on October 25, 1912, and the plaintiff was induced to purchase stock in the company in December of the same year.

On the trial counsel for plaintiff sought to prove the interest of defendant in the corporation at the time of the trial. This evidence was, we think, erroneously ruled out. There is, however, sufficient evidence in the record in support of the contention that the sale of the stock to the plaintiff was in fact made by and on behalf of the defendant. So far as the evidence shows he had a dominant interest in the corporation in December, 1912, and it is fairly inferable from the fact of this interest and other circumstances that the stock sold to the plaintiff was in fact the stock of the defendant. The transfer by defendant of certain shares of his stock to the corporation and then a nominal transfer from the corporation to the plaintiff did not change the essential nature of the transaction.

There is no merit in the contention that the contract was unenforceable in that the demand made upon defendant to repurchase the stock was made 17 months after plaintiff had purchased the shares of the stock. The contract does not come within the statute of frauds. In First Presbyterian Church v. Swanson, 100 Ill. App. 42, this court held that contracts which may or may not be performed within a year are not embraced within the statute.

The evidence shows, and the trial court also finds, that the defendant definitely agreed to repurchase the shares of stock in question. From the whole evidence it is easily discernible that the plaintiff was induced by the promises made by defendant to purchase shares of stock in the company.

We think the trial court should have permitted the introduction of certain evidence which was tendered for the purpose of showing that the corporation was controlled by the defendant and that he had caused the transfer of a substantial part of its assets to himself a short time before the plaintiff made demand that defendant repurchase the stock in accordance with his promises. Notwithstanding the exclusion of this evidence, it does appear from the whole record that in some unexplained manner valuable assets of the corporation were conveyed to defendant early in the year 1914.

The agreement of defendant to repurchase the stock in question at any time that plaintiff became dissatisfied with his purchase did not amount to the making of an option or gambling contract as contended. In Wolf v. National Bank of Illinois, 178 Ill. 85, it was held that where parties acted in good faith ^a/promise made by a bank to repurchase within a specified time certain bonds at the price for which they were sold, with interest, was a contract of conditional sale and not an option contract. Stewart v. Dodson, 282 Ill. 192.

The sale of the stock to plaintiff was in legal effect a sale of personal property with a condition attached that the purchaser might return the property within a reasonable time after the purchase if he became dissatisfied therewith. The evidence shows that the shares of stock were

The evidence shows, and the trial court also found, that the defendant's conduct is reprehensible. The court is of the opinion that the defendant's conduct is so reprehensible that the plaintiff is entitled to an award of punitive damages. The court is of the opinion that the defendant's conduct is so reprehensible that the plaintiff is entitled to an award of punitive damages.

The introduction of certain evidence which was excluded for the purpose of showing that the defendant was not guilty of the crime charged was not an error. The defendant's conduct was so reprehensible that the plaintiff is entitled to an award of punitive damages. The court is of the opinion that the defendant's conduct is so reprehensible that the plaintiff is entitled to an award of punitive damages.

The argument of the defendant in regard to the stock in question is not a valid one. The defendant's conduct was so reprehensible that the plaintiff is entitled to an award of punitive damages. The court is of the opinion that the defendant's conduct is so reprehensible that the plaintiff is entitled to an award of punitive damages.

The sale of the stock for which the plaintiff is entitled to an award of punitive damages was not a valid one. The defendant's conduct was so reprehensible that the plaintiff is entitled to an award of punitive damages. The court is of the opinion that the defendant's conduct is so reprehensible that the plaintiff is entitled to an award of punitive damages.

purchased in December, 1912; that about 17 months thereafter plaintiff demanded of Hopp that he repurchase the shares of stock. This offer to return the shares of stock might in some circumstances be regarded as coming too late, but when consideration is given to the fact of defendant's continued interest and probable control of the corporation in question and the conveyance by it to defendant of valuable property in disregard of the rights of other stockholders, the demands on defendant to repurchase plaintiff's stock must be held to have been made in apt time.

We do not deem it necessary to discuss other points presented by counsel. On the whole record plaintiff is entitled to recover.

The judgment of the Municipal Court will be reversed and judgment will be entered in this court in favor of the plaintiff for the sum of \$1200 with costs in this court and the trial court in favor of the plaintiff.

REVERSED AND JUDGMENT HERE.

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248 - 23773

MARIE JAHK,
Appellant,

vs.

JOSEPH HOFF,
Appellee.

210 I.A. 367

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago in favor of the defendant. By stipulation of the parties the case was consolidated for hearing with the cases numbered in this court 23772, 23774, 23775, 23776 and 23967.

This case in its facts is similar in all important respects to the case of James E. Hills v. Joseph Hoff, No. 23772, and for the reasons stated in the opinion filed in that case the judgment of the Municipal court will be reversed and judgment will be entered in this court in favor of the plaintiff for the sum of \$400 with costs in this court and the trial court in favor of the plaintiff.

REVERSED AND JUDGMENT HERE.

489 - 23774

VILLIAM F. BURRICK,
Appellant,

vs.

JOSEPH ROEPF,
Appellee.

210 I.A. 368

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of the defendant. By stipulation of the parties the case was consolidated for hearing with the cases numbered in this court 23772, 23773, 23775, 23776 and 23967.

This case in its facts is similar in all important respects to the case of James H. Ellis vs. Joseph Roepf, No. 23772, and for the reasons stated in the opinion filed in that case the judgment of the Municipal Court will be reversed and judgment will be entered in this court in favor of the plaintiff for the sum of \$250 with costs in this court and the trial court in favor of the plaintiff.

REVERSED AND JUDGMENT HERE.

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430 - 23772

ROY E. SCHNEIDER,
Appellant,
vs.

JOSEPH HOPP,
Appellee.

210 I.A. 369

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of the defendant. By stipulation of the parties the case was consolidated for hearing with the cases numbered in this court 23772, 23773, 23774, 23776 and 23967.

This case in its facts is similar in all important respects to the case of James E. Hills vs. Joseph Hopp, No. 23772, and for the reasons stated in the opinion filed in that case the judgment of the Municipal Court will be reversed and judgment will be entered in this court in favor of the plaintiff for the sum of \$100 with costs in this court and the trial court in favor of the plaintiff.

REVERSED AND JUDGMENT HERE.

STATISTICS

Table 1. Summary of the data for the year 1960.



The data for the year 1960 is summarized in Table 1.

The data for the year 1961 is summarized in Table 2.

The data for the year 1962 is summarized in Table 3.

The data for the year 1963 is summarized in Table 4.

The data for the year 1964 is summarized in Table 5.

The data for the year 1965 is summarized in Table 6.

The data for the year 1966 is summarized in Table 7.

The data for the year 1967 is summarized in Table 8.

The data for the year 1968 is summarized in Table 9.

The data for the year 1969 is summarized in Table 10.

451 - 23776

CHARLES D. FIERCE,
Appellant,

vs.

JOSEPH HOPE,
Appellee.

210 I.A. 370

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of the defendant. By stipulation of the parties the case was consolidated for hearing with the case numbered in this court 23772, 23773, 23774, 23775 and 23967.

This case in its facts is similar in all important respects to the case of James H. Hills v. Joseph Hope, No. 23772, and for the reasons stated in the opinion filed in that case the judgment of the Municipal Court will be reversed and judgment will be entered in this court in favor of the plaintiff for the sum of \$500 with costs in this court and the trial court in favor of the plaintiff.

REVERSED AND JUDGMENT HERE.

5864 - 23967

EDWARD THIEDE,
Appellee,

vs.

JOSEPH HOPP,
Appellant.

210 I.A. 371
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago in favor of the plaintiff and against the defendant for the sum of \$300. By stipulation of the parties the case was consolidated for hearing with cases numbered in this court 23772, 23773, 23774, 23775 and 23776.

The defendant by his appeal to this court seeks to reverse this judgment. The material facts as shown by the record in this case are not in essential particulars different from those disclosed by the evidence shown in the record of the case of James R. Hills v. Joseph Hopp, No. 23772. The judgment of the trial court in favor of the plaintiff in the instant case seems to be based upon certain evidence which tended to show that the plaintiff, Thiede, in a particular manner placed trust in the promises made by the defendant, Hopp. It is our opinion, however, that this case does not differ in any material respect from the Hills case.

The judgment of the Municipal Court will therefore be affirmed.

AFFIRMED.

WILLIAM J. THOMAS, for the
use and benefit of Reid,
Murdock & Company,
Appellee,

vs.

THOMAS STENHOUSE,
Appellant.

210 I.A. 372

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court in favor of the plaintiff for the sum of \$157.05.

The principal question in dispute between the parties is as to whether the plaintiff had received his fair and just proportion of the proceeds of a sale by auction of certain stocks of goods and fixtures. The defendant owned and operated a grocery store adjoining which was a meat market owned and operated by the plaintiff. The parties were joint owners of two horses and wagons. In accordance with the mutual agreement of the parties the stocks of goods, fixtures, horses and wagons were sold at auction for the total sum of \$1,800.

It is a disputed question between the parties whether the auctioneer who sold the property had authority to sell it in bulk or whether he was specifically directed to dispose of it in separate parcels or lots. We need not consider that question here as the judgment of the trial court seems to be predicated upon a finding that the sale of the property in bulk did not constitute a violation of any agreement between the parties. The defendant does not complain of this finding.

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THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

RECEIVED
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TO THE ATTORNEY GENERAL

FROM THE DIRECTOR, FBI

SUBJECT: [REDACTED]

RE: [REDACTED]

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The evidence shows that the plaintiff received the sum of \$202.95 out of the total sum for which the property was sold and he insists that the defendant retains to his own use part of the proceeds of the sale which in law is the property of plaintiff.

On the trial a witness for defendant testified that his stock of grocery goods was worth, at the time of the sale, \$1,400 or \$1,500. The auctioneer, who claims to have had the power to apportion the value of the different classes of goods sold in bulk by him, fixed the value of defendant's grocery stock at \$1,250. Plaintiff testified that this stock was worth only \$800 to \$900. Other evidence was heard with reference to the value of the stock of goods, fixtures, etc., owned by plaintiff and that owned by defendant. The issues involved with reference to these matters, were, however, purely of fact. Evidence was introduced upon the trial in favor of the contention of each party to the suit and in the circumstances we cannot say that the findings of the court were erroneous.

The trial court in determining the value of the property sold, which was owned by either party, does not seem to have accepted the values as fixed by any witness or class of witnesses. The trial Judge had an opportunity to see and hear the witnesses who testified and we know of no rule of law which compelled him to accept as true the testimony offered by either party. The court had the power to fix the sum of \$1,000 as the value of the stock of grocery goods owned by defendant, notwithstanding the fact that plaintiff considered the stock was worth from \$800 to \$900 and that defendant's witnesses testified that it was worth from \$1,400 to \$1,500.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

The evidence shows that the defendant received

the sum of \$200.00 out of the bank and that the
property was sold and the proceeds were deposited in
the name of the defendant of the bank which is

in the possession of the defendant.

On the basis of the evidence the defendant is liable

for the sum of \$200.00 and costs of \$10.00.

The defendant, who claims to be

innocent of the crime, has been found guilty of the crime of

larceny of goods to the value of \$200.00.

The defendant's property worth \$10.00, consisting of a car

and a radio, was sold for \$10.00.

Heard also testimony of the owner of the car of \$10.00,

the car of \$10.00 and the radio of \$10.00.

The defendant is liable for the sum of \$200.00.

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The defendant is liable for the sum of \$200.00.

The defendant is liable for the sum of \$200.00.

471 - 23816

ALBERT HASSELL,
Appellee,

vs.

STATE BANK OF WEST FULLMAN,
a corporation,
Appellant.

210 I.A. 373
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

John Szczpanek executed and delivered to plaintiff a check which was as follows:

"Chicago, Dec. 13, 1917.
State Bank of West Fullman
Pay to the order of Albert Hassell
Three Hundred 00/100 Dollars
John Szczpanek."

This check bore the endorsements of Albert Hassell and B. W. Sulz. The defendant State Bank of West Fullman paid the amount of the check to B. W. Sulz on or about December 13, 1916. On the trial of the cause in the Municipal Court plaintiff introduced evidence which tended to prove that he had not endorsed, nor had he authorized any person upon his behalf to endorse the said check and that his signature on the back thereof was a forgery.

The verdict of the jury and the judgment of the court were in favor of the plaintiff for the sum of \$300 and the defendant brings the case here by appeal for review.

It was admitted on the trial that at the time the check was paid to Sulz, the maker, John Szczpanek, had sufficient funds on deposit in the bank to pay the check and that plaintiff, after payment of the check to Sulz, had made demand for payment thereon, which payment was refused by defendant.

The plaintiff, who was the only witness in the case, testified that the check was delivered to him by

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Szczpanek and that he, plaintiff, thereafter delivered the check to Sulz with instructions to take it to the defendant bank and have it certified and to mail it back to plaintiff. The check appears, by perforations therein, to have been paid on the 14th day of December, 1916, and presumably defendant paid the amount of the check to Sulz, whose name appears last in the endorsements on the back thereof.

The defendant's theory is that under the Negotiable Instruments Act of June 5, 1907, it could not be made liable to plaintiff until it had been shown by the evidence that it had accepted or certified the check; that it did not certify the check; that the only thing it did in relation thereto was to pay it on a forged endorsement, and that such payment, under the law, did not amount to an acceptance.

In support of their contention counsel for plaintiff rely upon the case of Rauch v. Bankers National Bank, 143 Ill. App. 625. In that case the court held, on facts materially different from those involved in the instant case, that where a bank had paid checks on forged endorsements of the payees, any such payee in an action of assumpsit, could not recover the amount paid by the bank for the reason that under the Negotiable Instrument Act of 1905 the bank could not be held liable in the absence of proof of an actual acceptance or certification of the checks. In that case the payee, plaintiff, presented the checks and made demand for payment on the bank 15 months or more after the checks had been paid on the forged endorsements. The present case is a fourth class case brought in the municipal court and under the decided cases the form of action is to be regarded as whatever the evidence

[illegible]

makes it.

The evidence introduced on the trial shows an actual conversion of the check, which was the property of the plaintiff, by the defendant bank, and such being the case the action will be held to be an action in tort for the conversion by defendant of this property.

It is insisted in the reply brief of defendant that in the case at bar no cause of action was stated in the statement of claim filed by plaintiff either in tort or contract. The statement of claim was sufficient in the absence of objections thereto at the trial to support the judgment of the trial court. The statement charged the payment of the check by defendant to one B. W. Sulz without either the endorsement or the authority of the plaintiff. This is an allegation which, if true, amounts to a charge that the defendant had converted the check to its own use.

In Bentley, Murray & Co. v. Janelle Trust and Savings Bank, 197 Ill. App. 322, this court held, in an action substantially similar to the case at bar, that trover might be maintained in an action for the conversion by a bank of a check which had been paid by the bank on a forged endorsement of the name of the payee named in the check. In deciding the case the court said:

"Trover may be maintained for notes and bills, and the measure of damages is prima facie, the amount of their face. It is well settled that a forged indorsement does not pass title to commercial paper negotiable only by indorsement and does not justify the payment of such paper."

And in distinguishing the Bentley, Murray & Co., case from the Rauch case, supra, the court stated that:

"The cases relied upon by counsel * * * * * are all cases where the payee of the check brought assumpsit, and it was held that because of the lack of contractual relations between the payee and drawee assumpsit could not be maintained, and have no application to a case where the payee alleges the conversion of the checks."

We think the judgment of the Municipal Court is correct and it will be affirmed.

AFFIRMED.

W. R. COLLINS ICE CREAM
COMPANY, a corporation,
and ISIDORE WINEBERG,
Appellants,

vs.

MORRIS TALMAGE, JOSEPH A.
HOTTINGER and MARY E.
O'CONNELL,
Appellees.

210 I.A. 374

WRITAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

Complainants filed a creditors' bill to enforce judgments obtained by them respectively, which upon hearing by the chancellor was dismissed for want of equity. From this order complainants appeal.

The complainant W. R. Collins Ice Cream Company on January 26, 1915, obtained a judgment against the first defendant, Morris Talmage, for \$100, and the complainant Isidore Wineberg on January 27, 1915, obtained a judgment against Talmage for \$1,620.28, and the bill alleged the issuance of executions and returns unsatisfied.

From the record it appears that the defendant Joseph A. Hottinger, on or about January 5, 1914, owned a drug store at 3764 N. Sheffield Avenue, Chicago, on which he owed about \$2,000. By an instrument dated January 5, 1914, Hottinger agreed to sell the store to Talmage for \$4,375, \$2,000 of this in cash and the balance evidenced by 24 notes, 23 of them for \$75 each, due on or before 1 to 23 months after date respectively, and the last note for \$550 due on or before 24 months after date. The property transferred to Talmage is described in the agreement of sale as follows:

498 A.T.O.T.S.

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"The entire stock of goods, wares, merchandise, fixtures and other chattels of every kind, nature and description, consisting of the stock of drugs, drug sundries, soda fountain and accessories, cigars, tobaccos, prescription scales, one stove, one electric fan, one iron safe, one cash register, all counters and other fixtures of every kind, nature and description located and situate in or upon the store and basement of the two-story frame building known as No. 3764 N. Sheffield avenue, in the City of Chicago."

To secure the payment of these notes Talmage executed and delivered to Hottinger a chattel mortgage, duly acknowledged and recorded, in which the property mortgaged was described in the identical language above quoted. There are no words in the mortgage providing that the mortgagee should have a lien on any after acquired goods, but only a lien upon the goods and chattels described in the agreement of sale. Talmage thereupon took possession of the store and carried on the business. The stock of drugs, candies and cigars was constantly changing, and Talmage made purchases to replenish the stock at an average of about \$350 per month. He also installed new fixtures costing about \$100. Hottinger came into the store very frequently, and then started to work there, relieving Talmage in the evenings. For a period of about six weeks prior to the foreclosure hereinafter described, Hottinger was in the store about four hours every day. The evidence tends to show that most of the stock was sold in the ordinary course of business and replaced by new merchandise. Talmage paid the first nine notes, aggregating \$675, as they came due, but did not pay the \$75 note which fell due on November 3, 1914. Some time between that date and November 13th, Hottinger took possession of the store, with the keys, under pretense of giving Talmage a few days to make a sale of the store. The evidence shows that at the suggestion of Hottinger, to

which Talmage consented, it was agreed that a foreclosure of the chattel mortgage and sale of the property should be conducted as follows, which was accordingly done: The mortgage provided that prior notice of the time, place and terms of such a sale should be given "by notices posted up in three public places in the vicinity of such sale." Hottinger posted three notices on the building, which were immediately torn off by Talmage, who says that they did not remain posted over a second. This was in pursuance of Hottinger's suggestion that "I will post three notices and you can take them down immediately, and then there will be nothing to show anything foreclosed and the creditors will not know anything took place in this store." There is abundance of other evidence indicating that the purpose of removing the notices instantly was to escape the possibility of information of the foreclosure and sale reaching creditors. From that time the store was kept open during the usual business hours and business was conducted just as usual.

On November 18th what purports to have been a foreclosure sale was held. No advertisement of the sale was made. Hottinger requested two men to attend, neither of whom was a druggist and who had no expectation that they would bid for the property. There was also present a Miss O'Connell, Hottinger's sister in law, who bid for the property and to whom it was sold for \$950. However, it is clearly proven that Miss O'Connell was a mere dummy, paying nothing whatever for the property and buying it solely for Hottinger at his request. Subsequently an inventory of all the stock in trade was made, which it is said covered the floating stock that changed

which Thimbley announced, it was agreed that a foreclosing
of the mortgage and sale of the property should
be conducted as follows, which was accordingly done: The
mortgage provided that prior notice of the sale, to be
given at least a week before the day the notice was to
be given, should be given by notice posted in
three public places in the vicinity of such sale. The
three places named were on the bulletin, which were
immediately torn off by Thimbley, who says that they did
not remain posted over a second. This was in accordance
with the mortgage and it will be noted that the
you can take down immediately, and then there will be
nothing to show any legal foreclosing and the mortgage will
not have anything more to do in this matter. There is
abundance of other evidence indicating that the purpose of
issuing the notice was to prevent the foreclosure
of interest in the property and sale thereof. It is
true. From that time the case was left open until the
usual business hours and business was conducted as usual.

On November 18th, when Thimbley was away, there was
foreclosing sale was held. In reversionment of the sale was
made. Thimbley requested two men to attend, neither of whom
was a grantor and who had no expectation that they would
bid for the property. There was also present a Miss (name)
Thimbley's sister in law, who bid for the property and it was
sold for \$2500. However, it is clearly proven that this
property was being sold by Thimbley as his property.
It is also noted that Thimbley was not present at the sale.

from day to day, and the evidence shows that the value of this was \$2,258. There is further evidence that the fixtures were of a value of \$1,000.

We are not referred to any decision which has held that such a mortgage as this covers after acquired property. In Borden v. Croak, 131 Ill. 68, it was held that in the absence of any words in the instrument indicating an intention to subject its lien to future acquisitions, it could not be extended to include any other property than that existing at the time of its execution and delivery. There are other cases holding that no lien is created on property not at the time owned by the mortgagor, except apt words are contained in the mortgage conveying future acquired property. Hunt v. Bullock, 23 Ill. 258; Titus v. Mabey, 25 Ill. 232. We are of the opinion that the chattel mortgage did not cover after acquired property, and that the general stock in trade sold by Rottinger to himself at the pretended mortgagee's sale, was subject to the liens of the complainant creditors.

The pretended sale was not bona fide. One of the conditions of making a sale was that three notices thereof should be posted. The purpose of posting was to give information to the public, including creditors. This implies that not only must the notices be fixed on a public place but that they should be permitted to remain there. In no possible legal sense can it be said that a notice is posted which is put in place and almost instantly removed by the party placing it there or his agent. Under the circumstances before us we hold that there was no posting of notices of sale as required by the terms of the chattel mortgage.

To order and have your business card made, call us at 408-251-1111
 or visit our website at www.408.com. We also
 have a 24-hour fax line at 408-251-1111. To order or to place

Another fact which invalidates this sale is the inadequacy of the price. The consideration of the sale purports to have been \$950, whereas the evidence shows that the store and its contents were worth at least \$3,258 at the time. It has been held that failure to post notices of sale together with inadequacy of price, is sufficient to set it aside, as well as a deed delivered in pursuance thereof. McDaniel v. Wetzel, 264 Ill. 412. In Wilson v. Kellogg, 77 Ill. 47, the court said in its opinion that the greatest fairness is required in the conduct of such sales and that "any agreement, contract or arrangement entered into, on the part of the buyers, calculated to stifle competition at the sale, is contrary to public policy, a fraud upon the law, and would vitiate the sale." To the same effect is Loyd v. Malone, 23 Ill. 43, and Ingalls v. Howell, 149 Ill. 163. See also Jones on Chattel Mortgages, secs. 802 and 808a, 4th ed. In Herman on Chattel Mortgages, p. 507, it is said:

"The conduct and fairness of a sale by a mortgagee and the rights under it, are always open to investigation at the instance of the mortgagor. * * Such sales will be jealously watched, and upon the slightest proof of unfair conduct, or a departure from the power, will be set aside. Everything done by the parties to such sale, calculated to prevent a competition, renders it void. A mortgagee, selling under a power of sale in his mortgage, will be held strictly responsible for any prejudice to the mortgagor, arising from any deviation from the provisions governing the exercise of the power and the statute requisitions as to notice."

For the reasons above indicated we hold that the mortgage did not cover after acquired property, and that the alleged sale thereunder was fraudulent and invalid as to creditors; that Kettinger received the property and holds the same in trust for the benefit of the complainants, who were judgment creditors of Talmage, and that Kettinger

is also a consideration of the fact that the

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THE BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF
STATE BAR ASSOCIATIONS HAS ADOPTED THE FOLLOWING
RESOLUTIONS:

RESOLUTION NO. 1. WHEREAS, the National Association of
State Bar Associations is a non-profit organization
incorporated under the laws of the United States
and the several States, and has as its purpose
the promotion of the highest standards of
conduct and efficiency in the legal profession;
and WHEREAS, the National Association of State Bar
Associations is a member of the International
Bar Association, and has as its purpose the
promotion of the highest standards of conduct
and efficiency in the legal profession;
and WHEREAS, the National Association of State Bar
Associations is a member of the International
Bar Association, and has as its purpose the
promotion of the highest standards of conduct
and efficiency in the legal profession;

should be ordered and decreed to pay complainants the amount of their respective judgments. The decree of the Superior Court will therefore be reversed and the cause remanded with instructions to enter findings as above indicated and to order Joseph A. Hottinger to pay complainants the amount of their respective judgments.

REVERSED AND REMANDED

WITH DIRECTIONS.

should be ordered and decided in the same manner as the
of their respective branches. The duties of the members
Court will therefore be reduced to the same number
with instructions as when I last was elected President and
to advise Joseph A. Walker to pay attention to the
of their respective branches.

Respectfully,
Your obedient servant,
J. A. Walker

BARBARA KLONP, Adm. of the
Estate of WILLIAM KLONP,
deceased,

Appellee,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

Appellant.

210 I.A. 375

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for the death of William Klomp against the Chicago, Milwaukee & St. Paul Railway Company and the Commonwealth Edison Company. Upon trial the jury returned a verdict of not guilty as to the Commonwealth Company under an instruction of the court, but found the Railway Company guilty and assessed the damages in the sum of \$5,000, and judgment for this amount was entered from which the defendant Railway Company appeals.

On July 13, 1914, William Klomp was employed by the defendant as an engineer in charge of the operation of a steam crane of the defendant used in track elevation on its Evanston division. While swinging the boom of the crane, the cable attached at the top came in contact with one of the electric light wires of the Commonwealth Edison Company strung on poles in a public alley running alongside the right of way of the defendant on the east; the wire was broken, part of it falling into the street on the ground. After several minutes Klomp walked some distance to the broken wire where it lay in the street, and although it was flashing and sparking and evidently a live wire, he picked it up and held it in his hands for some minutes, and then received an electric shock which caused his immediate death.

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was defendant at the time and place engaged in interstate commerce, making the Federal Employers' Liability Act applicable? We are of the opinion that it was not?

At the time of the accident, pursuant to an ordinance of the City of Chicago, defendant was engaged in elevating the right of way of its Evanston division, sixty-six feet in width, for a number of blocks in Chicago. This division connected with other divisions of defendant's line of railway running into other states. In the work of elevating the tracks a retaining wall of concrete was constructed on the east line of the right of way as a support to the material used for filling between the concrete walls. This wall was made by erecting timber forms and pouring concrete into them, which when set the forms would be removed and used again in another section. A steam crane was used in the elevation work and operated by Klomp, the deceased. In the daytime it was used for hoisting concrete and pouring it into the forms for the retaining wall, and at night it was used to transfer the forms to the next section north as the work progressed.

The decision in Dickinson v. Industrial Board of Illinois, 280 Ill. 342, is squarely applicable to these facts. In that case the person injured was a carpenter engaged in building forms into which concrete was to be poured for the purpose of forming retaining walls, part of the construction in elevating tracks. The court held that the work at which the carpenter was engaged had no connection with transportation and was simply preliminary to the erection of a structure which might be used as part of the roadbed used in interstate commerce. The work of building the forms and operating the

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crane in pouring the concrete and removing the forms in the present case was like that in the Dickinson case, and we hold on the authority of that case that the work of Klomp had no connection with interstate commerce.

It is conceded that at the time of the accident the Workmen's Compensation Act of Illinois of the year 1913 was in force in this state, and that the defendant had elected not to come under the provisions of this act. By section 3 of said act it is provided that in any action to recover damages against an employer who shall elect not to come under the provisions of the act it shall not be a defense that, "first, the employe assumed the risks of the employment; second, the injury or death was caused in whole or in part by the negligence of a fellow servant; or, third, the injury or death was proximately caused by the contributory negligence of the employe."

Was the negligence of the defendant charged in plaintiff's declaration the proximate cause of Klomp's death? The negligence charged was the failure of the defendant to furnish Klomp a reasonably safe place to work, in that it required him to operate the crane dangerously near to electric wires against which the crane was likely to come in contact. Even if it should be conceded that the evidence establishes the negligence charged, can it be said under the facts disclosed that this negligence was the proximate cause of the death of Klomp? When the cable on the boom of the crane struck the wire there was a flash, which the witnesses say was like lightning. The end of the wire which fell into the street sputtered and flashed. That it was a wire charged with electricity was evident to everyone. The carpenter-foreman of the defendant saw the wire fall, and stationed men to guard it; he also sent a watchman to telephone

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to the Commonwealth Company to shut off the current. After the wire was broken Kloop continued with the crane for a short time, then left it and started to walk toward the street. His foreman and a flagman and the carpenter-foreman warned Kloop against touching the live wire, but disregarding this he picked it up two or three feet from the end, although he was warned again by the carpenter-foreman to drop it. He held the wire in his hands for about five minutes when he received the shock which caused his death. It does not appear that any other persons were in immediate danger from the wire, and it is clear that if it had been allowed to lie on the ground until the current was shut off, which was done shortly, no one would have been injured. It does not clearly appear as to just what Kloop had in mind in picking it up. There is no evidence from which it can be said that it was done with the purpose of preventing injury to other persons.

Ordinarily the question of what is proximate cause is one of fact for the jury, but whether there is any evidence tending to show that the negligence charged was the proximate cause is a question of law. If the negligence does nothing more than furnish a condition by which the injury is possible, and a subsequent independent act causes the injury, the existence of the condition is not the proximate cause of the injury, and if the act which is the immediate cause of the injury is such as in the exercise of reasonable diligence would not be anticipated, the connection is broken and the first act or omission is not the proximate cause of the injury. Beith v. Commonwealth Electric Co., 241 Ill. 252.

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the immediate cause of the accident was the failure of the driver to maintain a safe distance from the vehicle in front of him. The driver of the vehicle in front of him was also at fault for not maintaining a safe distance from the vehicle in front of him. The driver of the vehicle in front of him was also at fault for not maintaining a safe distance from the vehicle in front of him.

The holding in the Seith case controls our decision as to the instant case. Klomp was an engineer of experience, with good health and eyesight, and it could not reasonably be anticipated that he would submit himself to the extreme hazard of electrocution by picking up a live wire, especially in the face of warnings by his associates. There was no way by which the defendant could have prevented Klomp from doing this extremely hazardous thing. See, also, C. & I. L. Ry. Co. v. Barr, 204 Ill. 163.

It will not avail to say that Klomp undertook to remove the wire so as to avoid danger to passersby. There is no evidence of the presence of anyone else at this point except the employes of the defendant, who saw the wire and were fully aware of the danger, as evidenced by their warnings to Klomp. The burden was on plaintiff to prove that deceased exposed himself to the danger for the purpose of saving the lives of others exposed to danger, and there was no evidence tending to prove that fact. Mevine v. Pfaelzer, 277 Ill. 255.

We are of the opinion that the evidence fails to prove that the negligence charged against defendant was the proximate cause of the death of plaintiff's deceased, and hence the judgment of the Circuit Court must be reversed with a finding of fact.

REVERSED.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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FINDING OF FACT.

We find under the evidence that the negligence charged in plaintiff's declaration, or any count thereof, was not the proximate cause of the death of William Klomp, plaintiff's deceased.

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THE PITTSBURGH, CINCINNATI, CHICAGO
& ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

JAMES S. TEMPLETON, JAMES S. TEMPLE-
TON and KENNETH S. TEMPLETON, co-
partners trading as JAMES S. TEMPLE-
TON & SONS,

Appellees.

210 I.A. 377

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover from the de-
fendants demurrage charges on cars of grain consigned to
them. They defended on the ground that plaintiff had not
given notice as required by the rules concerning demurrage.
On trial by the court a finding was made favorable to de-
fendants' contention and it was adjudged that plaintiff take
nothing.

By stipulation and testimony it appears that
plaintiff is a railroad company engaged in interstate com-
merce, and defendants are grain dealers. The Ellis Brier &
Elevator Company owns an elevator located on the tracks of
plaintiff in Chicago, which is called the "Reckwell Elevator."
This company is engaged in business at this elevator of
transferring, drying, cleaning, cooling, mixing and bleaching
grain, which service is performed for anyone sending grain to
the elevator for treatment. Defendants purchased the carloads
of grain in question on the Board of Trade for shipment east;
they were then on tracks of various western roads which had
brought them into Chicago. On the day of these purchases de-
fendants were solicited by the commercial agent of the plain-
tiff to send said grain east over plaintiff's road, and if it
should require treatment or conditioning the agent solicited

2101A.377

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.
JANUARY 10, 1944

TO: THE UNITED STATES OF AMERICA

FROM: THE UNITED STATES OF AMERICA
SUBJECT: THE UNITED STATES OF AMERICA
RE: THE UNITED STATES OF AMERICA

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.
JANUARY 10, 1944

the business for the Rockwell Elevator, located on plaintiff's line. Defendants assented to this and handed the agent lists of the cars which they were sending over plaintiff's road to the Rockwell Elevator. These lists contained the car numbers and initials and defendants' name, and in some cases the contents of the cars. The lists were taken by plaintiff's agent to its western freight agent's office and delivered to other agents of plaintiff to use in making up bills of lading. Directions were given by the defendants to the sellers of the grain to consign the same to the defendants at the Rockwell Elevator, which instructions were followed by the sellers, but the western roads failed to advise plaintiff on delivering such cars as to the name of the consignees, merely directing that the cars be delivered at the Rockwell Elevator. Plaintiff finding the Rockwell Elevator delivery tracks congested, and being unable to make actual delivery, undertook to make what is called constructive placement of said cars, by giving notice on a notice blank to "Rockwell Elevator, Chicago." No other notices were sent, and defendants never received any notice whatever.

The demurrage rules introduced by plaintiff in evidence provide among other things that -

"Consignee shall be notified by carrier's agent in writing, or as otherwise agreed to by carrier and consignee, within twenty-four hours after arrival of cars and billing at destination, such notice to contain point of shipment, car initials and numbers, and the contents. * * *

"When delivery of cars consigned or ordered to private or industrial interchange tracks cannot be made, on account of the act or neglect of the consignee, or the inability of consignee to receive, delivery will be considered to have been made when the cars were tendered. The carrier's agent must give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks or because of other conditions attributable to consignee."

Plaintiff contends that its notice to the Rockwell

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed amendments to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which were adopted by the General Assembly of the United Nations in December 1979.

1. The above information was obtained from a confidential source who has provided reliable information in the past.

Elevator was notice to defendants, the consignees, for the reason that the Rockwell Elevator was an agent of the defendants. This contention is not sound. The "Rockwell Elevator" is not the name of any person or corporation; it is merely the name of a point on plaintiff's tracks where the Ellis Drier & Elevator Company was engaged in business. Furthermore, even if this notice might be construed as notice to the Ellis Company, this company was not an agent of the defendants but was an independent contractor, and notice given to an independent contractor is not notice to his employer. *Nechem on Agency*, 2nd ed., secs. 40, 41 and 1834.

Plaintiff cannot be excused on the ground of ignorance as to the identity of the consignees. The evidence is conclusive not only that plaintiff, through its agent, solicited the business from the defendants, but that the name of defendants as consignees was transmitted by this agent to the proper offices of the plaintiff.

Plaintiff's argument seems to be based upon considerations of convenience, but the fact that it was simpler to send notice direct to the elevator does not relieve the railroad from the condition imposed by the rules as a prerequisite to the imposition of a demurrage charge, which is in the nature of a penalty for failure of the consignee to dispose of delivered goods with reasonable promptness. This view is also supported by testimony tending to show that if defendants had received notice of the inability of the Ellis Company to handle the cars they would have made other disposition of them.

Other considerations are presented by the

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plaintiff, which are not supported by the evidence or upon principle.

The judgment was right and is affirmed.

AFFIRMED.

1. The following are the names of the persons who have been

admitted to the

membership of the

association.

PATRICK REYNOLDS,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

210 I.A. 379

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured while engaged in his employment as a motorman for the defendant, operating a system of street cars in Chicago. He brought suit, and upon trial had a verdict and judgment for \$3,600 which defendant seeks to have reversed.

Plaintiff in his declaration alleged that defendant and plaintiff, its servant, were engaged in the kind of business and work to which the Workmen's Compensation Act, approved June 23, 1913, applies; that this statute was in effect in Illinois but that the defendant, prior to the time of plaintiff's injuries, had elected not to come under the provisions of the Act and filed notice of such election with the Industrial Board created by the Act, and posted notices of this election in the places where plaintiff was employed, which notices were filed and posted within such time and in such manner as was required by said Act.

Has plaintiff proven the election of defendant not to come under the Compensation Act? The Workmen's Compensation Act went into effect July 1, 1913. By section 2 it is provided that the employer "shall be conclusively presumed" to be under the Act "unless and until notice in writing of his election to the contrary is filed with the industrial board and unless and until the employer shall either furnish to his employe personally or post at a conspicuous place in the plant,

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shop, office, room or place where such employe is to be employed, a copy of said notice of election not to provide and pay compensation according to the provisions of this act." It is also provided by section 1 of the Act that the filing of the notice not to come under the Act after the expiration of the calendar year must be "at least sixty days prior to the expiration of any such calendar year," and that the posting must also be "at least sixty days prior to the expiration of any such calendar year."

The accident happened on December 21, 1914, and in order for plaintiff to prove his allegations above mentioned it was necessary for him to prove that defendant had filed its notice with the Industrial Board at least sixty days before January 1, 1914, and had also posted copies of the notice at least sixty days prior to that time.

In part 1 of the advance sheets of the Illinois Supreme Court reports, vol. 283, we find two decisions which in our opinion determine the variant contentions on this point. These cases are Beveridge v. Illinois Fuel Co., 283 Ill. 31; Barnes v. Illinois Fuel Co., 283 Ill. 175. These cases decide definitely that the plaintiff has the burden of proving that the defendant has elected not to be bound by the Compensation Act. We are also of the opinion it follows logically from these opinions that the question of estoppel of the defendant to deny that he is not under the Act need not be considered, for it is not in the case. Under the statute the defendant is conclusively presumed to be under the Compensation Act, and this presumption continues regardless of any course of conduct on its part, until the party asserting the contrary overcomes this presumption by sufficient proof. Upon the plaintiff here was the burden of proving the doing of those things which the statute prescribes

...office, room or place where your employee is to be employed. A copy of said notice of election not to provide such any communication according to the provisions of this act. It is also provided by section 1 of the act that the filing of the notice not to come under the act after the expiration of the calendar year must be at least sixty days prior to the expiration of any such calendar year, and that the notice not to come under the act must be at least sixty days prior to the expiration of any such calendar year.

The election was made on December 31, 1914, and in order for plaintiff to prove his election was made, it was necessary for him to prove that defendant had filed its notice with the Industrial Board of Illinois sixty days before January 1, 1915, and had also posted copies of the notice at least sixty days prior to that time. In part 1 of the advance sheets of the Illinois

Supreme Court reports, vol. 233, we find two decisions which in our opinion determine the point of construction on this point. These cases are Hartridge v. Illinois (vol. 233, 1914) and Illinois v. Hartridge (vol. 233, 1914).

These cases decide definitely that the plaintiff has the burden of proving that the defendant has elected not to be bound by the Compensation Act. We are of the opinion it follows logically from these opinions that the question of estoppel of the defendant is a matter that is not under the Act need not be considered, for it is not in the case. Under the statute the defendant is conclusively presumed to be under the Compensation Act, and this presumption continues regardless of any course of conduct on the part, until the party asserting the contrary overcomes this presumption by sufficient proof. Now the plaintiff here was the burden of

as the only terms upon which the defendant would not be bound by the Act, and proof of other matters will not avail.

These cases, and especially the Beveridge case, also decide that the filing of the notice with the Industrial Board and the posting are separate, independent acts, and each must be proven, and that proof of one will not be considered as an admission or proof of the performance of the other requirement. Applying this to the present case, if plaintiff has failed to prove the filing of the notice with the Industrial Board sixty days before January 1, 1914, it is immaterial as to the posting. On behalf of the plaintiff the secretary of the Industrial Board testified and produced the notice which had been sent to his office by the defendant. This notice was stamped as having been filed with the Board November 4, 1913, and the secretary testified that this was the day upon which it was received and filed in the office of the Board. It is conceded that this date is less than sixty days prior to January 1, 1914, hence the notice was ineffective for the year 1914. This was all the evidence ^{on this point} introduced by the plaintiff upon his case in chief, and at the conclusion of his testimony the defendant moved the court that the jury be instructed in its favor, which motion was denied and the instruction refused. We are of the opinion that this motion should have been granted and the instruction given.

The evidence on behalf of the defendant tended to show that the notice had been mailed on November 1, 1913, which was Saturday, directed to the Industrial Board at Springfield, Illinois. By the evidence it is also shown that the Board has

as the only basis upon which the defense would not be

bound by the Act, and proof of other matters will not

be.

These facts, and especially the following ones,

also decide that the filing of the notice with the Industrial

Board and the posting and recording, in the Industrial Board, and each

must be proved, and that proof of one will not be considered

as an admission or proof of the performance of the other re-

quirement. Although this is the present case, it is not

the failure to prove the filing of the notice with the In-

dustrial Board which is the basis of the defense, it is the

neglect to do so on the part of the defendant, and the burden

of proof is on the defendant to show that the notice was

not filed with the Industrial Board, and that the notice was

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no office at Springfield, but since October, 1913, had had its office in Chicago. We know of no rule which would permit us to hold that notice sent to the wrong place, not reaching its destination until some time later, should be held as good as of the day it was first mailed, especially in view of the mandate of the statute requiring this notice to be "filed" with the Industrial Board. Plaintiff in failing to prove the filing of the notice within the required time has failed to prove an essential element of his case, and hence cannot recover in this action.

It was error for the trial court to deny defendant's motion to instruct the jury to return a verdict for it. For the reasons above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

an office at Springfield, and since October, 1910, had had
his office in Chicago. He knew of no other person would
be able to do this kind of work in the same way, and
feeling the situation with regard to the work, would be
able to find me at the end of the line, and possibly
in view of the number of the persons receiving this in-
formation as well as the information given, I thought
it better to give him the information at the same time
and place, and that he would be able to give it to
the other persons who were interested in the same.
It will give you the information at the same time
and place, and that he would be able to give it to
the other persons who were interested in the same.
I will give you the information at the same time
and place, and that he would be able to give it to
the other persons who were interested in the same.

JULIUS THOMAS,
Appellee,
vs.
JOHN HOWATT,
Appellant.

210 I.A. 380

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, while riding a motorcycle on Lake Shore Drive near Lincoln Park, came in collision with an automobile belonging to the defendant. Plaintiff received injuries, including a fractured leg, and brought suit for damages, and upon trial before court and jury was awarded a verdict for \$750, upon which the court entered judgment from which defendant appeals.

If the jury believed the testimony adduced on behalf of the plaintiff, they were warranted in concluding that the accident was caused by the negligent driving of defendant's automobile and that plaintiff was in the exercise of due care. Defendant's testimony tended to contradict that of plaintiff in several important particulars. It would be of no avail to relate the variant stories of the witnesses. There is no inherent impossibility in either story, and the determination of the facts rested almost solely upon the credit which the jury gave to the witnesses. Its opportunity, as well as that of the court, to judge of the truthfulness of those testifying upon the trial was superior to that of this court. We therefore cannot conclude that the jury was not justified in accepting plaintiff's theory of the occurrence rather than that of the defendant. Under such circumstances it is the duty of this court to affirm, which is done.

AFFIRMED.

033 21012

It was later determined that the defendant was not the person who was responsible for the damage to the car. The defendant was not the person who was responsible for the damage to the car. The defendant was not the person who was responsible for the damage to the car.

426 - 23771

ABE SACKIN,
Appellee,

vs.

EMIL J. KRINSKY,
Appellant.

210 T.A. 381

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Defendant complains of a judgment against him, but by his abstract fails to inform us what the judgment was. This alone is sufficient to warrant an affirmance.

The abstract likewise is silent as to an affidavit of merits. In such a circumstance the presumption is in favor of the judgment and that the defense was inadequate.

The suit was brought against defendant as guarantor for the payment of rent and the performance of covenants under a lease running from October 15, 1916, to May 1, 1919, and was for the recovery of rent due for the month commencing July 15, 1917, together with a sum expended by plaintiff for water taxes.

It is contended by defendant that the lease is silent as to when the installments of rent are to be paid, and that in the absence of a provision to the contrary rent is payable only at the end of the term. Under the facts this argument is palpably unsound. The lease names the sum payable for the entire term, and then proceeds: "payable as follows: One Hundred (\$100) dollars on the 15th day of October, 1916, and.....(\$.....) on the 15th day of each and every succeeding month of the term." This can only mean that \$100 shall be paid on account of rent on the 15th day of each month during the term, and is just

2101A 188

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D.C.

RECEIVED
JUL 17 1917
U.S. DEPT. OF JUSTICE

THE ATTORNEY GENERAL
WASHINGTON, D.C.
JUL 17 1917
TO THE SECRETARY OF THE ARMY
FROM THE ATTORNEY GENERAL
SUBJECT: [Illegible]

FOR THE ATTORNEY GENERAL
WASHINGTON, D.C.
JUL 17 1917
TO THE SECRETARY OF THE ARMY
FROM THE ATTORNEY GENERAL
SUBJECT: [Illegible]

IT IS ORDERED BY THE ATTORNEY GENERAL
WASHINGTON, D.C.
JUL 17 1917
TO THE SECRETARY OF THE ARMY
FROM THE ATTORNEY GENERAL
SUBJECT: [Illegible]

as clear as if the blank space appearing in the form had been filled in by repeating the words "one hundred dollars."

As to the assertion that this construction might operate to compel the payment eventually of a sum greater by \$30 than that specified in the lease for the entire term, attention is directed to the brief of plaintiff wherein is disclaimed any intention to demand more than the total sum so specified, and where also it is admitted that the plaintiff would have no such right.

The judgment of the Municipal Court was proper and is affirmed.

AFFIRMED.

as shown in the sketch of the room in the lower part
been filled in by removing the stone floor covering
as to the construction of this connection

which shows as shown the present condition of the
ground by the line level indicated in the lower part of the
line level, attention is directed to the fact that the
structure is indicated by the line to be made and that the
ground can be reached, and that it is indicated that
the building would have to be built.

The layout of the building is shown in the upper

and is attached.

ENCLOSURE

WILLIAM C. HARTRAY, Admr. of
the Estate of FRANK JAGIELSKI,
deceased,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

210 I.A. 382

APPEAL FROM SUPERIOR COURT,
COCK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment against it of \$7,500 had by plaintiff in an action alleging the death of Frank Jagielski through the negligent operation of one of defendant's street cars.

We shall note only one of the points made by the defendant. It is asserted that the trial court erred in overruling defendant's motion in arrest of judgment, for the reason that the declaration stated no cause of action because it fails and omits to allege facts from which any inference may be drawn that the action was brought within one year from the death of plaintiff's intestate, as required by the statute. The declaration does not contain such allegations, and the statute in force provides that such an action to recover shall be commenced within one year after the death. Is this provision as to time a statute of limitation or a condition precedent to the right of action? Whatever confusion may have heretofore existed on this point has been cleared by the recent decision of our Supreme Court, appearing in part 1 of the advance sheets, in Carlin, Admx., v. Fearless Gas Light Co., 283 Ill. 142. In this case the court definitely decides that this provision is not a statute of limitations;

388 A.1013

WILLIAM L. BROWN, JR.,
 AND
 JAMES L. BROWN, JR.,
 Defendants,
 vs.
 THE UNITED STATES,
 Plaintiff.

THE UNITED STATES OF AMERICA, by and through the undersigned

Special Agent in Charge, do hereby certify that the within-
 entitled indictment was returned at St. Louis, Missouri, in and against
 the above-named defendants on the basis of a true bill returned
 by the grand jury of the Eastern District of Missouri.

The said indictment was returned by the grand jury of the
 Eastern District of Missouri, at St. Louis, Missouri, on the

day of January, 1934, in and against the above-named
 defendants on the basis of a true bill returned by the grand jury
 of the Eastern District of Missouri, at St. Louis, Missouri, on the
 day of January, 1934, in and against the above-named defendants
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"that the time fixed for commencing the cause of action created by the statute is a condition of the liability, and operates as a limitation of the liability itself and not of the remedy, alone." It follows therefore that the condition annexed to the right of action given by the statute, forms a part of the right itself and is an essential fact which must be pleaded in order to state a cause of action.

In the same advance sheets, part 1, vol. 283 Ill., page 31, is the case of Beveridge v. Illinois Fuel Co., wherein the court reasserts the familiar rule that "a declaration which fails to state a fact whose existence is necessary to entitle the plaintiff to recover does not state a cause of action."

Following these opinions, it was error in the trial court to deny the motion in arrest, and we must therefore reverse, and as this error cannot be cured upon another trial judgment of nil capiat will be entered in this court.

REVERSED AND JUDGMENT HERE.

ROZALIE BRAZEK,
Appellee,

vs.

MARIE A. TOLLAR,
Appellant.

210 I.A. 384
APPEAL FROM CIRCUIT COURT,

COSCO COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On February 13, 1917, judgment by confession was entered against the defendant on two judgment promissory notes. Thereafter on motion of defendant to have the judgment vacated and set aside, leave was given to plead, but the judgment was allowed to stand as security. Defendant then filed the plea of the general issue and a special plea that the notes were given without consideration. Pursuant to showing made by the affidavit of plaintiff the case was placed on the short cause calendar, but on defendant's motion to strike for the reason that the cause was not at issue, leave was given plaintiff to file a replication instanter, the case was stricken from the short cause calendar and, over the objection of defendant, was advanced to the head of the trial calendar and set for immediate hearing. At the request of defendant's attorney trial was postponed for a week; upon hearing, the motion to vacate was denied.

We are unable to agree with defendant's first contention that the trial court in so advancing the cause was guilty of an abuse of discretion constituting reversible error. We fail to see how in the circumstances the rights of defendant were thus prejudiced, and, nothing to the contrary appearing, it will be presumed that the court so acted for good and sufficient cause.

The evidence shows that in 1895 August Brejcha

486 ALIENS

[illegible]

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And, finally, as we have seen, the fact that the

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— and I, therefore, am not, in the least, surprised that you should have been

10-10-68

UNITED STATES OF AMERICA

[illegible][illegible]

REVEREND AND OBEISANT SERVANTS OF THE GODS TO THE VILLAGE OF

purchased certain real estate, and between this time and 1902 conveyed the same to his daughter Marie. In 1901 a judgment was had by Vojtech Tolar against Brejcha in the sum of \$1,298.60, but whether this was before or after the said transfer to Marie does not appear. On April 4, 1902, Marie Brejcha by warranty deed conveyed the property to Charles Mrazek for an expressed consideration of \$8,500. This conveyance, while absolute in form, would seem to have been made merely to secure a note of \$1,000 representing a loan theretofore made by Charles and Rozalie Mrazek, his wife, to Brejcha, part of which sum defendant claims was expended by Brejcha for the benefit of a building and loan association of which he was treasurer.

August Brejcha died December 6, 1903, and in 1908, his estate being still unsettled, letters of administration de bonis non were issued to his daughter, Marie, then the wife of Vaclav A. Tollar. Prior to this appointment, that is, on March 26, 1904, Marie Brejcha obtained a re-conveyance of the property from the Mrazeks, having paid \$500 on the debt secured thereby. She gave in return her trust deed to said property to Charles Hruby, as trustee, securing the balance due of \$640, together with her note for this amount.

On March 24, 1905, Vojtech Tolar obtained a sheriff's deed to said property from a sale under his judgment above mentioned, and on June 7, 1905, by quit claim deed conveyed his interest therein to Marie Brejcha for a consideration of \$1,800, after he had started a forcible detainer suit.

On July 30, 1908, the said Marie, with her husband, Vaclav A. Tollar, conveyed the property to Frantisek Kozenij, subject to the trust deed to Hruby, and on July 3, 1911,

transferred certain property to the United States and

that conveyed the same to the United States. In 1941

a judgment was rendered by the United States District Court in the

case of U.S. vs. [redacted], but judgment was not entered at that time

and judgment is being given now. On April 1, 1942,

particulars of [redacted] were given to the

Commissioner for an extended consideration of [redacted].

This consideration, while pending in [redacted], would seem to have

been made nearly as soon as possible of [redacted] and [redacted].

It is interesting to note by [redacted] and [redacted] that

also, in [redacted], part of which was [redacted] [redacted] was [redacted]

pending by [redacted] for the [redacted] of [redacted] and [redacted] [redacted]

in [redacted] of which he was [redacted].

August [redacted] and [redacted] [redacted] [redacted] [redacted]

and [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]

which the [redacted] was [redacted] to his [redacted] [redacted]

from the [redacted] of [redacted] [redacted] [redacted] [redacted] [redacted]

and, that is, on [redacted] [redacted] [redacted] [redacted] [redacted]

re-considered it the [redacted] from the [redacted] [redacted] [redacted]

\$[redacted] of the [redacted] [redacted] [redacted] [redacted] [redacted]

trust deed to said property to [redacted] [redacted] [redacted] [redacted]

during the [redacted] of [redacted] [redacted] [redacted] [redacted] [redacted]

this [redacted].

On March 24, 1942, [redacted] [redacted] [redacted] [redacted]

[redacted]'s [redacted] to said property from a [redacted] under the [redacted]

next [redacted] [redacted], and on [redacted] [redacted] [redacted] [redacted] [redacted]

[redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]

On [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]

and, [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]

[redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]

Kozenj quit-claimed to Tollar, also for a consideration of \$1,800. At the time the notes in this suit were executed, September 22, 1913, title to the property, therefore, was in Vaclav A. Tollar, husband of the defendant, subject to the trust deed to Hruby securing Marie Tollar's note for \$640.

In September, 1913, the Tollars, being desirous of disposing of the property, Mrs. Tollar called at the Mrazek home and requested Mrs. Mrazek to surrender the mortgage and take Mrs. Tollar's note, promising that as soon as she got the money from such sale she would pay the note. Later the two women met in Hruby's office, at which time the mortgage was released and Mrs. Tollar, as administratrix of her father's estate, executed the notes here sued on. It seems to have been then understood that Tollar also would sign the notes, but this he did not do. However, the testimony of plaintiff that later, upon her asking him to sign the notes, he stated he would give her the money when the house was sold, is nowhere contradicted.

As further grounds for a reversal defendant contends (1) that the notes in question were intended to be signed by two persons but were signed by but one, - hence no action can be maintained as the contract is incomplete. This is not the law in Illinois. A note made out in the plural form but signed by only one is a valid obligation of the signer. Reid v. Degener, 82 Ill. 508.

(2) It is claimed that the notes were not founded upon a good consideration. It clearly appears, however, that these notes were given in consideration of the release of the trust deed to Hruby of date May 26, 1904.

Moreover, the balance due on the loan to defendant's deceased father never ceased to be a lien against the property which could have been enforced in equity had the notes here not been executed at all.

(3) The contention that although the promise to pay the debt of another be in writing, it is, nevertheless, of no force unless founded upon a good and valuable consideration, finds answer in what has been said under the preceding point.

(4) Defendant in referring to the Vojtech Tolar transaction as an eviction, states a conclusion not justified by the evidence. The forcible detainer suit started may or may not have resulted in an eviction, but the defendant herself by satisfying the lien of Tolar rendered unnecessary a determination of that issue. The claim, therefore, that the title of defendant to the premises was superseded by a paramount title and the defendant evicted, is without the least merit.

Under the evidence the judgment is proper and is affirmed.

AFFIRMED.

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...very which could have been...
...not been... of it.

(8) The... the...
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LEOKADJA SKOCZDOPLE and
JOSEPH SKOCZDOFLE,
Appellees,

vs.

THE PEOPLES LIFE INSURANCE
COMPANY, a corporation,
Appellant.

210 I.A. 386

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court in an action on an insurance policy covering the life of Edwin Skoczdople, issued by a company whose business was afterwards turned over and assumed by the defendant.

The policy provided that "this insurance is granted in consideration of a weekly premium * * which shall be paid * * on or before every Tuesday during the continuance of this contract." The amount payable in the event of death was prescribed in a schedule on the face of the policy; in this case it was \$70, for which sum judgment was entered.

A provision in the policy upon which defendant relies to defeat the claim reads as follows: "Should the insured die while the premium on this policy is in arrears for a period not exceeding four weeks, the Company will pay the benefits provided herein, subject to the conditions of the policy." The insured died December 29, 1916. Defendant refused to pay the benefit stipulated, contending that by reason of failure to pay premiums due November 27, 1916, and thereafter, prior to the date of death, the policy lapsed by virtue of the provision quoted.

The best evidence of premium payments is the receipt book of defendant of record herein. Under the heading

2101A.283

THE UNITED STATES OF AMERICA

OF THE DISTRICT OF COLUMBIA

IN SENATE

COMMITTEE ON

THE JUDICIARY

REPORT
ON THE
COMMITTEE'S
HEARINGS
ON THE
PROPOSED
REVISIONS
OF THE
FEDERAL
JUDICIAL
ACTS

IN SENATE, MAY 1, 1907.

THIS IS TO CERTIFY THAT A TRUE AND CORRECT COPY OF THE

REPORT OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE,

ON THE PROPOSED REVISIONS OF THE FEDERAL JUDICIAL ACTS,

AS APPROVED BY THE SENATE, MAY 1, 1907,

THE CLERK OF THE SENATE HAS CAUSED TO BE PRINTED:

PRINTED IN SENATE, MAY 1, 1907.

OF THE DISTRICT OF COLUMBIA.

AT WASHINGTON, D. C., MAY 1, 1907.

AND PUBLISHED BY THE SENATE.

THIS COPY IS FOR THE USE OF THE SENATE.

A PUBLICATION OF THE SENATE.

PRINTED BY THE SENATE.

OF THE DISTRICT OF COLUMBIA.

AT WASHINGTON, D. C., MAY 1, 1907.

AND PUBLISHED BY THE SENATE.

THIS COPY IS FOR THE USE OF THE SENATE.

A PUBLICATION OF THE SENATE.

PRINTED BY THE SENATE.

OF THE DISTRICT OF COLUMBIA.

AT WASHINGTON, D. C., MAY 1, 1907.

"Date when due" appears the notation "Nov. 27, 1916"; in the column adjoining, under the heading "Date when paid" is written "November 4, 1916." Opposite these entries is the signature of defendant's agent, who had long been in its employ as collector and who must be held to have receipted the book in conformity with the true state of the account. The receipt book shows, therefore, that the premium due November 27th was paid November 4th. The next weekly payment was due Tuesday, December 5th, but would not be ^{a week} in arrears until the following week, or December 12th. On this basis the four weeks' period of grace allowed by the policy would not terminate until Tuesday, January 2nd, four days subsequent to the death of insured.

The evidence shows a compliance by plaintiffs with the requirements of the policy concerning notice to defendant of the insured's death, and further the payment in ample time of all premiums in arrears under the policy.

The judgment is affirmed.

AFFIRMED.

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THOMAS J. SULLIVAN,
Appellee,

vs.

THOMAS E. O'BRIEN, MARY L.
O'BRIEN, CHARLOTTE L. O'BRIEN
and HELEN DURKIN,
Appellants.

210 I.A. 393

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Complainant, a judgment creditor, to the amount of \$725 and costs, of defendants Thomas E. and Mary L. O'Brien, his wife, filed his creditor's bill asking that a conveyance made by them of certain real estate to Helen Durkin and by her to Charlotte L. O'Brien, their daughter, be set aside as in fraud of creditors. Answers under oath were filed by Thomas E., Mary L. and Charlotte L. O'Brien. Reference was had to a master, who reported sustaining complainant's contention, and upon exceptions to the report the chancellor affirmed the report and entered a decree in accordance with its recommendations.

Briefly stated, the facts properly found by the master are that complainant recovered his judgment in April, 1915; execution issued in May and demand thereon made upon Thomas E. and Mary L. O'Brien in August, 1915, who scheduled their property and claimed that it was exempt from execution; subsequently the execution was returned no part satisfied. Prior to September 15, 1914, Mary L. O'Brien was the owner in fee simple of real estate known as 4516-18 Prairiev Avenue, in Chicago, at that time vacant, with a frontage of 50 feet, worth \$100 a front foot. On this date she conveyed this real estate to the defendant Helen Durkin, no consideration passing. On the next day,

September 16th, Helen Durkin conveyed it to the defendant Charlotte L. O'Brien, a daughter of Thomas E. and Mary L., and since that time Charlotte has held title of record; no consideration was paid by her to Helen Durkin for the conveyance. Charlotte is a school teacher with a salary of \$77.50 a month. She testified that she paid \$10 for the property and agreed to support her mother and father if they were in need. Mrs. O'Brien testified that she did not remember such an agreement, and Mr. O'Brien testified that there was no agreement - "it was just generally understood." Mrs. O'Brien on September 15, 1914, owned a house and lot in Wisconsin, valued at \$1,000, which was her homestead and exempt from the claims of creditors. At this time she also had on deposit with Peabody, Houghteling & Co. \$1,976.06 in cash, and the Acme Co., of which her husband was president and treasurer, owed her \$595. This was all the property owned by her at the date of the conveyance of the real estate. On the same day she withdrew from the above deposit \$200, and on September 23, 1914, another \$200; on November 24, 1914, the entire balance was withdrawn by her and placed to the credit of another daughter, Nellie E. O'Brien, who testified that she used it for family expenses. Thomas E. O'Brien owned 61 shares of stock of the Acme Co., which in August, 1914, had become financially embarrassed. In September, 1914, he surrendered a life insurance policy of \$10,000 for \$4,640, which money he paid into the Acme Co. In January, 1915, proceedings in bankruptcy against the Acme Co. were instituted and it was adjudicated a bankrupt and its property was sold for the benefit of creditors. Mr. and Mrs. O'Brien's respective claims against it were surrendered and

The first of these is the fact that the company has been in existence since 1901, and has a long and successful record. It has been a member of the National Life Insurance Association since 1901, and has been a member of the American Life Insurance Association since 1901. It has also been a member of the National Life Insurance Association since 1901, and has been a member of the American Life Insurance Association since 1901.

nothing was ever paid on them; neither did the stockholders get anything, and other creditors got less than 4%. Mr. O'Brien testified that at the time of the conveyance to Charlotte the affairs of the Acme Co. were "quite mixed up"; he had no other means at this time.

The conclusion of the master was that on September 15, 1914, while Mr. and Mrs. O'Brien were not actually insolvent they were in failing circumstances, and that it was not intended by them or by Charlotte that Mrs. O'Brien should cease to be the real owner of the real estate. The master further concluded that there was no consideration good as against creditors for the conveyance from Mary L. O'Brien through Helen Durkin to Charlotte L. He recommended that these conveyances be set aside and the property sold to satisfy the judgment of complainant. The decree of the court follows substantially the findings of the master, and orders that the conveyances aforesaid be set aside so far as the lien of complainant's judgment is affected.

We are of the opinion that the master and chancellor were justified both in their findings of fact and in their conclusions, and that this is a case coming within the rule that even if there is no fraudulent intent, a voluntary conveyance to a child in consideration only of love and affection, where the grantor is in embarrassed or failing circumstances, and the conveyance has the effect of withdrawing the property from the claims of creditors, leaving no unencumbered funds in the grantor's hands for the payment of debts, will be set aside. See Emerson v. Bemis, 69 Ill. 537, where the court said: "The rule, that every man is bound to be just before he is generous,

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will not, in the situation this debtor was, tolerate the withdrawal of such a comparative large amount of property as there was here, from the reach of creditors, and placing it in the hands of the debtor's wife." The court also held that such conveyance must have been intended by the grantor to delay and hinder creditors, and that therefore the land should be made subject to the payment of their claims; although it was unnecessary that it should be shown that there was a fraudulent intention on his part. Other similar cases are Bowden v. Bowden, 75 Ill. 143; Morrill v. Kilner, 113 Ill. 318; Bohn v. Weeks, 50 Ill. App. 236.

Defendants ask for the application of the rule that the averments of the sworn answers must be taken as true unless they are overcome by the testimony of two credible witnesses, or of one witness corroborated by facts and circumstances equal to the testimony of another. Mercants' National Bank v. Lyon, 146 Ill. 343. A number of witnesses testified, including Mr. and Mrs. O'Brien and both their daughters, and their testimony sufficiently supported the allegations of complainant's bill, and also successfully overcame any assertions of fact contradicting the allegations of the bill. There is really no substantial controversy as to the essential facts, and these are drawn largely from the testimony of defendants themselves. The controversy is over the conclusions drawn from the facts. We see no reason to disagree with the conclusion of the chancellor upon the record, and the decree of the Circuit Court is affirmed.

AFFIRMED.

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JOHN CHIDLEY,
Appellee,

vs.

RICHARD BRAY and A. T. KATES,
Appellants,

210 I.A. 394

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, while employed by defendants in 1902, had his hands injured by a machine known as a punch press. He sued to recover damages, and upon trial had a verdict and judgment for \$4,000, from which judgment defendants appeal.

By his declaration plaintiff alleged that the defendants negligently put him to work upon a machine out of repair, defective and unsafe, of which defendants knew or in the exercise of ordinary care might have known, and that while plaintiff was in the exercise of due care and caution for his safety, by reason of the defective machine his hands were caught and his fingers mangled.

The evidence tends to show that the punch press consists of a heavy base and frame fixed to the floor, with moving parts operating within the frame, and mechanism controlling those parts; its purpose is to cut and press into shape, between dies or forms, tin utensils of various kinds, such as pie plates. One die is fixed on the table or base, the other is fastened to a moving part immediately above it, which brings the upper die down onto the lower die when power is communicated to it from a large wheel on the side. The operation of the machine is controlled by a treadle fastened on its base near the floor. This treadle connects by rod with a small plunger resting near a fric-

tion clutch. When the treadle is pressed down it moves the rod and the plunger is engaged with the clutch, causing the power to be applied and the machine to operate. The treadle is held at rest by a spiral spring under the table, which stretches when the treadle is pressed down by the foot of the operator, and when the foot is removed the spring pulls the treadle up into normal position. With one pressure of the treadle the machine makes one revolution, that is, the die comes down and returns to its upper position. This revolution will be performed by simply pressing the treadle down and then removing the foot at once; it is not necessary to continue to hold the treadle down to complete the operation. If the pressure of the foot upon the treadle should continue during a complete operation and remain after the second operation has commenced, the second operation will then be completed although the foot be removed from the treadle. The machine does not stop immediately upon releasing the treadle but continues until the operation upon which it has started is completed, that is, when the top die is at its uppermost position.

The machine is known as a Bliss press, and the evidence shows that it is a standard machine for this purpose, being in general use in shops. It was new, having been installed in the early part of 1902, while the accident happened in June of that year. The evidence also tends to show that it was in daily use without change, from the time of the accident to the time of the trial, which was in December, 1916, a period of about fifteen years.

Plaintiff at the time he received the injury was nearly twenty years of age. He had been employed by the defendants for about four weeks before the accident, and with

the exception of a few days had operated the machine during all of that time. Prior to this employment he had worked for other companies on machines of various kinds and was familiar with machinery generally. When he was put to work on this machine he was shown by the foreman how to use it, and told to be careful, and was specially warned of the danger of getting his fingers caught between the dies. The evidence tends to show that it was not necessary for him to put his fingers between the dies in feeding tin plates into the machine. There was also evidence tending to show that other workmen in the shop had noticed that he was putting his fingers under the die, and that he was repeatedly warned as to the danger of doing this. Plaintiff attempts to explain the presence of his fingers between the dies by testifying that the three sheets of tin which he had put in were warped or bent, which made it necessary for him to put his hands under the die to press the sheets flat. It was clearly shown, however, that this was not necessary, for the sheets could have been flattened out before putting them under the die, and in any event he would not be required to hold his fingers in this dangerous place no matter in what shape the sheets of tin might be. There was what is called an automatic knockout working through the lower die, which pushed the finished plates to one side. Ordinarily in operating the machine the operator would wait until the dies were at rest, then put the pieces of tin onto the lower die, press down the treadle with his foot, and then release it; after the operation was completed and the upper die at rest he would repeat these movements.

Plaintiff claims that at the time of the accident the upper die was returning to its top position, the knockout

acted and threw aside the completed pie plates, and that while putting in the sheets for the next operation the top die came down, catching his fingers; that is, the machine repeated; he says he did not have his foot on the treadle when the die caught his fingers; he does not say he did not leave his foot on the treadle until after the machine started on the second revolution and then removed it. He was the only witness as to the actual occurrence.

The only evidence showing any defect in the machine had to do with the spiral spring which was intended to keep the treadle in its lifted position when at rest. The evidence was that shortly after it was installed the hook of the spring by which it was fastened to the treadle broke. The effect of this would be to allow the treadle to drop, which would cause the dies to operate continuously until the machine was stopped. The spring was then tied temporarily to the treadle, but it broke ^{again} while plaintiff was operating the machine some four weeks before the accident. After this incident the spring was properly repaired, and since that time and for fifteen years thereafter, up to the date of the trial, never again gave any trouble but continued to perform its work properly. There was no evidence whatever as to any other defect in the machine, and no evidence whatever as to any lack of repairs, or defects, at the time of the accident.

Plaintiff, therefore, rests his case upon the rule that it is not always necessary to show the specific or particular defect under these circumstances, but that the presence of a defect may be shown by the improper working or operation of the machine; to this end evidence was introduced tending to show that the machine before the time of the accident had frequently made the double operation or repeated

its revolution without the operator setting it in action by pressing his foot upon the treadle. Examination of the testimony of the witnesses on this point makes it clear that the repeating then referred to was because of the defective spiral spring, and that this was the only cause where there was a real repeating not started by the operator. All the witnesses are agreed as to the proper repair of the spring, and also that after the repair was made it worked perfectly in lifting the treadle and that no repeating thereafter took place except as to the particular instance in the case of the accident to which plaintiff testifies. The real question, however, is not as to the fact of repeating on this occasion, but as to the cause of this double operation. The record is wholly silent as to any cause for repeating in the machine itself. We are therefore compelled to accept the only possible explanation, which is that plaintiff, either through inadvertence or habit, kept his foot on the treadle until it had passed the point where the operation started in which his fingers were caught. It is to be noted that there is no definite denial of this by any witness. As noted above, plaintiff's statement is that he did not have his foot on the treadle at the time of the accident, which, in view of the operation of the machine above described, is entirely consistent with his starting the operation which produced the injury.

As between a wholly speculative and inexplicable cause and one that is natural, reasonable and probable, and that is not specifically denied, we have no difficulty in accepting the latter. We are of the opinion that plaintiff has failed to prove that the accident happened through any defect in the machine, but that the greater weight of the evi-

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dence tends to show that the accident happened through his own action in the operation of the machine.

For the reasons above indicated the judgment is reversed with a finding of fact.

REVERSED.

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The court finds that the machine upon which plaintiff was working and by which he was injured was not out of repair, defective and unsafe at that time, and that the injury he received was not caused by said machine being out of repair, defective and unsafe, as alleged in plaintiff's declaration.

SAMPRID HARNSTROM,
Appellee,

vs.

ANDERSON ELECTRIC CAR CO.,
Appellant.

210 T.A. 395

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

In an action of replevin for the possession of an electric automobile and damages for its detention the jury returned a verdict for plaintiff, and from the judgment entered thereon defendant appeals.

It appears that plaintiff in December, 1915, purchased the automobile from the Detroit Electric Company through its agent, the defendant. Attached to the bill of sale was a slip entitled "Free Service Policy," which contained a statement to the effect that it would increase the efficiency and lower the cost of maintenance if owners would avail themselves of the monthly inspection service furnished without further charge by the defendant. In October, 1916, plaintiff, wishing an inspection of his car, drove to the office of the defendant on Michigan avenue, left the car standing in front and went inside; he stated the purpose of his call and was informed that the inspection would be made and that the car would be ready for him late that afternoon. Shortly thereafter a young man in defendant's employ was directed to run the car to the shops, which were to the rear of the premises, and in making this movement a collision occurred between this car and a gas car on Michigan avenue, with the result that plaintiff's car was badly damaged. Defendant

made the necessary repairs but refused to release the car unless plaintiff paid the expense thereof.

The position of the defendant is that the relation created between the parties was that of bailor and bailee, and that as the service to be performed by the bailee was to be done without recompense or reward the bailment was gratuitous, under which circumstances the defendant would be liable for gross negligence only. We cannot agree that such was the character of the service engaged. In connection with the contract of sale, as above noted, defendant undertook to give plaintiff free service as outlined in its circular attached to the contract. This offer might properly be treated as part of the consideration, and no doubt would operate in many instances as an inducement to prospective buyers of this class of cars. It is our opinion therefore that this service was not gratuitous but was something which the plaintiff as a customer of the defendant was entitled to without extra charge; that this made of the relation a mutual benefit bailment, under which the defendant became liable for ordinary negligence on the part of its servant in the operation of the car at the time of the accident.

Each side produced witnesses who testified concerning the happening of the accident and its cause. The jury concluded that the negligence of the driver of the electric car was responsible for it, and with this finding, from an examination of the evidence, we are in accord. It would appear that the traffic moving south in Michigan avenue at the time was heavy and somewhat congested; that the electric car started from the curb, the driver evidently intending to get into the line of southbound traffic, but that he failed to wait for sufficient space to be left by other machines to permit him to do so with safety; that he ran his

made the necessary repairs but failed to release the car

which was left in the street.

The location of the defendant is not known.

It is stated that the defendant was found in the car

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car into the fender or running-board of the gas car, which was running at a moderate rate of speed, the force of the contact causing him to lose control and the electric to run against the curb, up onto the sidewalk and against a building nearby. We believe from the evidence that the defendant's driver by the exercise of due care and caution could have avoided the collision and the consequent damages to plaintiff's automobile.

Complaint is made that the finding of the jury awarding damages to the plaintiff for wrongful detention was unsupported by any evidence. The record shows, however, that plaintiff was in the real estate business and used the car extensively in making trips to various parts of the city in the conduct of his affairs, and that the action of the defendant deprived him of its use for a period of more than three months. This being so, it can hardly be said that the allowance of \$100 as damages was excessive.

As to the point that the defendant had a right to detain the car because of nonpayment by plaintiff of a bill for \$8.29 covering the installation of a new controller authorized by plaintiff, it is clear from both the affidavit of merits and the evidence that the car was not being held for the payment of this small item but rather for settlement covering cost of repairs occasioned by the collision.

Our conclusion makes unnecessary a discussion of other points presented by defendant. The judgment of the Municipal Court was right and is affirmed.

AFFIRMED.

JAMES F. BISHOP, Admr. of the
Estate of WILLIAM E. FORD,
deceased,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

210 I.A. 397

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MCSURFLY DELIVERED THE OPINION OF THE COURT.

On November 12, 1913, William E. Ford, a fireman employed by the defendant, was killed through an accident in its boiler room. The administrator of his estate brought suit in trespass on the case, and upon trial had judgment for \$9,000 from which defendant appeals.

The original declaration consisted of two counts, the second of which was subsequently withdrawn. The first count is based upon the statutory liability under the "act to provide for health, safety and comfort of employees," Hurd's Illinois 1915 Stats., ch. 48, p. 1263. To this defendant filed the plea of not guilty. On March 30, 1915, more than a year after the death of plaintiff's intestate, plaintiff filed an amendment by which it was alleged that defendant was engaged in an employment to which the Workmen's Compensation Act in force May 1, 1912, applied, but that defendant had elected not to be bound by the act. To the declaration as amended defendant filed a plea of not guilty and a special plea that no cause of action as therein set forth accrued to the plaintiff within one year prior to the date of the amendment. Plaintiff demurred to the special plea and the demurrer was sustained. At the proper time the defendant entered a motion in arrest of judgment, which was denied by the court.

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THE
OFFICE OF THE
SHERIFF
COUNTY OF
SANTA BARBARA
CALIFORNIA

DEPARTMENT OF
CORRECTIONS
SANTA BARBARA
CALIFORNIA

On November 14, 1960, William A. Jones, a 1940-
and employed by the defendant. was riding through on their
road in the police room. The defendant of his vehicle
proceeds east in response to the case, and upon trial
testimony for 12, and then which defendant appears.
The original defendant testified that
during the course of which was a photograph taken. The
first count is a road upon the highway located under
the fact to provide the location, which was located at
County, Santa Barbara, California. The fact is that
it is defendant filed the view of the vehicle. On March 1,
1961, with a view of the vehicle. The fact is that
defendant testified filed on November 14, 1960, in
Jones, the defendant was arrested in an apartment in which
the defendant's description was in Jones and 12, 1961, and
filed, and that defendant was arrested and was to be found by
the fact. To the defendant of arrested defendant filed a
view of the vehicle and a photograph taken to Jones of 12-
tion as appears in the fact recorded in the defendant's
one year prior to the date of the arrest. It should be
noted as the fact filed on the defendant was arrested.

We hold that these orders by the court were erroneous and require that the judgment be reversed.

It is contended that the original declaration does not state a cause of action in that it omits to allege or state any facts showing that the employe and the employer at the time of the accident were not under the Workmen's Compensation Act. We are of the opinion that the point is well taken. That this is necessary has been decided in the recent cases of Haveridge v. Illinois Fuel Co., 283 Ill. 31, and Barnes v. Illinois Fuel Co., 285 Ill. 173, found in part 1 of the advance sheets. The decisions in these cases are so definite as to make any discussion of them unnecessary, and respective counsel have evidently studied them carefully.

That the original declaration contains not even a suggestion that defendant had rejected the Compensation Act is conceded; but it is said that plaintiff's intestate is not necessarily under the Compensation Act for the reason that this act does not cover casual employment, and that the allegations of the declaration are consistent with casual employment, and that the negative of this character of employment must be asserted and proven by the defendant. Two answers are sufficient to this. First, the allegations of the declaration clearly imply regular employment. These are that on November 12, 1913, the defendant owned and operated a street railway system and a power house, and that "prior to and at the time aforesaid, said deceased was employed by the defendant as a fireman, to fire and work with certain steam boilers, which the defendant operated in its said power house, which said boilers furnished steam to move and operate the dynamos, and other machinery, aforesaid, so used by the defendant in the generation and manufacture of electricity, as

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aforesaid; and as such fireman, the deceased earned, to-wit, four dollars per day"; also that the defendant maintained steam boilers "which the deceased was required to fire and work with, as aforesaid"; also references to the conduct of the deceased "in the discharge of his duties" as fireman. This and other language in the declaration is inconsistent with casual employment, and clearly is an affirmative allegation of regular employment. Dyer v. Black Masonry & Contracting Co., 192 Mich. 400.

A second answer to plaintiff's contention is that the burden is upon the plaintiff to assert in his pleadings and to prove that either the employee or the employer is not bound by the Compensation Act. The act is comprehensive in its terms, providing that "every employee of such employer, as a part of his contract of hiring or who may be employed at the time of the taking effect of this act and the acceptance of its provisions by the employer, shall be deemed to have accepted all the provisions of this act and shall be bound thereby," unless he shall reject it. Sec. 1. And by section 5 the term "employee" shall be construed to mean "every person in the service of another under any contract of hire, * * but not including any person whose employment is but casual." These last words clearly constitute an exception, and to bring himself within the exception plaintiff must affirmatively allege it. Victor Chemical Works v. Industrial Board, 274 Ill. 11.

We understand our Supreme Court, especially in the Barnes case, supra, to hold that the duty of pleading the removal of either employee or employer from the operation of the Compensation Act, and the burden of proving it, are

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upon the party relying thereon, whether it may be plaintiff or defendant. If this is not done, the presumption created by the statute that both parties are under the act continues. It follows, therefore, that if the plaintiff does not in his declaration negative this presumption, he has failed to state an essential element whose existence is necessary to entitle him to recover, and without this he has not stated a cause of action.

For the reasons above indicated we hold that the trial court was in error in both of the orders above referred to, and that the judgment must be reversed.

The time within which a recovery can be had in a death case had expired before plaintiff's amendment was filed; hence the errors cannot be cured upon a second trial; and as counsel for plaintiff has requested in the event that we should reverse that we do not remand, agreeing in open court to waive error, if any, in such an order, we shall not remand, but reverse with judgment of nil capiat in this court.

REVERSED AND JUDGMENT HERE.

When the party leaving the room, whether it was the plaintiff or defendant, it was not found, and the investigation showed that the party leaving the room was the plaintiff. It follows, therefore, that if the plaintiff does not in this investigation negative this proposition, he has failed to make any substantial showing that the plaintiff is guilty of the crime. It is to be noted, however, that the plaintiff has not failed to make a showing.

Of the reasons above indicated we find that the

still does not in fact, in fact, the plaintiff does not

show that the plaintiff is guilty of the crime.

The time which a plaintiff has in fact in a

case has expired before plaintiff's complaint was

filed; hence the plaintiff cannot be said to have failed

and the complaint for plaintiff was returned in due time.

We would observe that as we have found, nothing in open

court to state that, it may be shown in court, we shall not

show, and return with the case on all points in this court.

REVEREND AND HONORABLE JUDGE.

D. F. BURN, Receiver of the
Missouri Pacific Railway Co.,
Appellee,

vs.

CARLOADING & DISTRIBUTING CO.
and W. McMILLAN & SON,
(Defendants)

W. McMILLAN & SON,
Appellant.

210 I.A. 399

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant W. McMillan & Son, a corporation,
seeks to have reversed a judgment against it in the sum of
\$109.70.

The evidence showed that defendant shipped some
carloads of stone from Bedford and Clear Creek, Indiana,
some of them going to Omaha and the rest of them to Lincoln,
Nebraska. All shipments were billed through from origin to
destination, by way of St. Louis, Missouri. Plaintiff, a
common carrier, charged and collected freight from the de-
fendant for these shipments, but thereafter, defendant claiming
an overcharge, refunded the amount claimed. Subsequently
plaintiff learned that this claim for overcharge had been
allowed by mistake, and this suit is brought to recover the
amount refunded, and also \$7.18 undercharge on the shipments
to Lincoln. The shipments were interstate shipments, and
the rates are governed by the Federal Act to Regulate Com-
merce, and plaintiff asserts that his claim in this case is
based upon the proper tariff rate published and on file with
the Interstate Commerce Commission; that is, the amount
already paid for freight plus the amount of its judgment is
the correct amount to which plaintiff is entitled under the

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tariff rate. We are of the opinion that plaintiff's contention is correct.

The ordinary rule which prevents the recovery of money voluntarily paid under a mistake as to the law and under a claim of right, has no application to this kind of a case. The only rates which a common carrier may collect or a shipper pay are regulated by the Interstate Commerce act, and the law will not permit any different rate as a basis of settlement, through any device whatever. The only question for determination is as to what is the actual tariff rate, and the amount cannot be altered by alleged mistakes or misapprehensions of either party. Texas & Pacific Ry. Co. v. Mugg, 202 U. S. 242. There are numerous cases asserting this principle.

The rate now claimed by the plaintiff is the correct ^{through} rate in accordance with the schedule filed under the provisions of the Act to Regulate Commerce, and this does not seem to be disputed. If defendant is of the opinion that a combination of local tariffs shows that the through rate is unfair, the place to settle this is before the Interstate Commerce Commission.

There was no reversible error in the court's permitting an expert to explain some of the matters connected with the tariff rates and schedules. Sometimes it is necessary for an expert to make these intelligible to one inexperienced in such matters. In any event, the expert in this case gave no testimony which added to or changed any of the essential facts appearing in the record.

We see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

HENRY POLLENZ, Admr. Estate of
LOUIS F. DREUTH, deceased,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY
and CHICAGO RAILWAYS COMPANY,
Appellants.

210 I.A. 400

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MCKINLEY DELIVERED THE OPINION OF THE COURT.

Defendants by this appeal seek to have reversed a judgment against them for \$5,000 in an action brought to recover for the alleged negligence of the defendants causing the death of plaintiff's decedent, Louis F. Dreuth.

Dreuth was a conductor on one of the street cars operated by the defendants. About 9:30 o'clock on the evening of November 22, 1915, as the car upon which Dreuth was working was coming up the eastern incline of the Washington street tunnel, which runs under the Chicago river, a fuse blew out. The trolley pole was then fastened down under a hook for that purpose on top of the car, the brakes set and the motorman and conductor left their respective positions on the car and worked for a few minutes standing on the ground putting in the fuse. During this time the car stood still. After the fuse was replaced the motorman returned to the front of the car, and the conductor went to the rear and took hold of the rope attached to the trolley pole and was attempting to place the trolley upon the overhead wire, when the motorman released the brake, which permitted the car to slide backwards down the incline upon the conductor, crushing him so that he subsequently died.

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Defendants had elected not to pay compensation under the Workmen's Compensation law of the State of Illinois; therefore the defenses of assumed risk, contributory negligence and neglect of fellow-servant are not in the case.

Plaintiff had charged in his declaration that while the deceased walked behind the car and proceeded in the performance of his duties to replace the trolley upon the wire, the defendants carelessly and negligently failed to securely brake, fasten and hold the car, but permitted it to move down grade upon the plaintiff's deceased while he was attempting to replace the trolley. There is no dispute in the evidence as to the facts, and plaintiff's charge of negligence in this respect was abundantly proven.

The count containing the above allegation of negligence also contained allegations of negligence touching the failure of defendants to furnish a safe place to work, and the operation of the car following the car which struck plaintiff, and defendants contend that these acts are so co-related to the accident that the failure to prove either of these particulars was failure to prove the accident happened through negligence of the defendants. We do not agree with this contention; any one of these charges is not necessarily related to the others, but each is independent. The count might have been demurred to on account of duplicity, but after verdict its imperfections are cured.

We are of the opinion that defendants failed to prove the existence of a rule that under such circumstances the conductor should have replaced the trolley while standing upon the rear platform. At most, there was testimony tending to show a custom of conductors to stand at this place and watch the trolley as the car moved through the tunnel. While a car is moving the conductor necessarily should stand upon

the platform. No rule was proven requiring conductors to stand on the platform to replace a trolley when the car was standing still.

Neither does it avail defendants to say that the motorman had no reason to know that the conductor would stand back of the car. The car should not have moved until the conductor gave the signals. The car was dark; another car was a few feet behind this one. Under such circumstances for the motorman to release the brake so as to permit the car to go down the incline was a dangerous thing to do, and the jury could rightly consider it negligence causing the accident.

We see no substantial reason for disturbing the judgment, and it is affirmed.

AFFIRMED.

...and the ...

3.1.1.1. The "Cognitive" Approach

100-443887-100

[illegible]

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R H Dm Apr 10/18

210 I.A. 418

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

NOV 3 1917

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6462

George W. Brokhhausen, appellee 210 I.A. 418

vs

Appeal from Stephenson.

Ford Motor Company, appellant.

Niehaus, J.

This is an attachment suit commenced by the appellee George W. Brokhhausen, in the circuit court of Stephenson County, against the appellant, Ford Motor Company, to recover an amount claimed to be due the appellee for commissions as agent for the appellant, under a written contract of agency. The declaration filed consisted of the common counts, with which was filed a bill of particulars. The appellant pleaded the general issue to the declaration. A jury was waived by agreement of the parties, and the case tried by the court. There were issues joined on the attachment which were found in favor of the appellant. The court found in favor of appellee on his claim; and found that there was due him the sum of \$324.22; \$287.47 of the amount found due, being for the commissions claimed by the appellee under his contract. A judgment was rendered for the total amount stated; and for costs against the appellant, from which this appeal is prosecuted.

Appellee made several motions in this court to strike the bill of exceptions from the record and to affirm the judgment. We denied several of those motions but on the day this case was taken on call another such motion was made and we took that motion with the case, in order that the ground of our ruling might be stated. The motion is based upon affidavits filed here, made by various deputy clerks of the court below, and others. There was filed in this case on April 4, 1917 a complete record. It contains a bill of exceptions signed by the trial judge under date of October 31, preceeded by a certificate of the clerk, which said that the bill of exceptions was filed October 30, and followed after the certificate of the judge by the filing by the

STORIA 418

George W. Thompson, Plaintiff

vs

vs

Hotel Company, Defendant

Storia, 418

This is an agreement with defendant by which the plaintiff

George W. Thompson, in the district court of St. Louis

County, Missouri, against the defendant Hotel Company, to recover an

amount claimed to be due the plaintiff in consideration of a

contract made with the plaintiff, which contract was made

on the 1st day of January, 1900, and which contract was made

in consideration of the services rendered by the plaintiff

to the defendant Hotel Company, and which contract was made

in consideration of the services rendered by the plaintiff

to the defendant Hotel Company, and which contract was made

in consideration of the services rendered by the plaintiff

to the defendant Hotel Company, and which contract was made

in consideration of the services rendered by the plaintiff

to the defendant Hotel Company, and which contract was made

in consideration of the services rendered by the plaintiff

to the defendant Hotel Company, and which contract was made

in consideration of the services rendered by the plaintiff

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in consideration of the services rendered by the plaintiff

to the defendant Hotel Company, and which contract was made

in consideration of the services rendered by the plaintiff

to the defendant Hotel Company, and which contract was made

in consideration of the services rendered by the plaintiff

to the defendant Hotel Company, and which contract was made

in consideration of the services rendered by the plaintiff

clerk on October 30. Appellee contends that we must assume that the bill of exceptions was signed by the judge on the 31st. after it had been filed on the 30th. We do not so interpret the record. We hold that it means that there was filed on October 30 the bill of exceptions in the state it is now in with the signature of the judge attached thereto, and that the date October 31, was obviously a mistake of the judge in dating his certificate. It was not necessary that the judge should date his certificate. We understand the law to be that this certified record cannot be impeached in this court by the affidavits of any one. Appellee has filed contradictory affidavits made by certain clerks at different times, but the clerk as such does not make an affidavit. It is the affidavit of an individual. We act upon the clerk's certificate attached to the record. If there is anything incorrect about the bill of exceptions embodied in this record the only place to correct it was in the court below after due notice to the opposite party, and then a certified copy of the order correcting it and of the ~~corrected~~ correction could have been filed here. We cannot permit a duly certified record of the court below to be impeached here by affidavits.

It is contended by the appellant, that under the contract of agency, the appellee had no legal right to recover for the commissions claimed, until he had first furnished to the appellant satisfactory evidence under the contract of agency, that all commissions, and added commissions which were due and owing, or which might later become due and owing to appellee's sub limited agents had been fully paid; or until the appellee had made satisfactory arrangements with the appellant to insure the payment of the commissions, and added commissions, that were due or might become due to them, under their respective contracts with appellee. The clause of the contract upon which this contention is based is as follows:

"It is agreed that such added commissions shall not be paid to second party until the second party shall have furnished satisfactory evidence to first party that all commissions and added commissions due or owing, or which may later become due or owing, the sub-limited agents under the second party, have been fully paid, or until satisfactory arrangements are made with the first party to insure sub-limited agents being paid the commissions and added commissions which may be due or become due to them under their respective contracts."

We are of opinion that by the terms of the contract it was necessary for appellee to prove as a condition precedent to his right to recover for the commissions claimed, that he had furnished to the appellant satisfactory evidence of the fact, that there were no commissions due his sub-limited agents; also that there were no commissions which might later become due or owing to his sub-limited agents; or to prove that he had made satisfactory arrangements with the appellant with reference to such commissions, to insure their payment. While it is true that the evidence in the case which was offered by appellee tended to show, that there were no commissions due to any of the appellee's sub-limited agents at the time of the trial; no evidence was offered to prove, that the appellee had furnished the appellant with any satisfactory evidence that there were no commissions due or to become due later; nor was there any evidence of any arrangement with appellant made with reference to the payment of such commissions. We are of opinion, that under the terms of its contract with appellee, the furnishing of the satisfactory evidence mentioned, or the making of an arrangement with appellant to insure the payment of the commissions of appellee's sub-limited agents, was a condition precedent to appellee's right to recover and he could not be legally subjected to suit before compliance therewith. While we are not passing upon the question as to

It is agreed that such a condition shall not be valid
second party until the second party shall have furnished
satisfactory evidence to first party that all conditions have
been complied with or waived, or which may later become due on
demand, the sub-limited party shall have the second party, in the
event, or with satisfactory arrangements and make it
the first party to insure sub-limited party with the
commissioners and other conditions which may be due on demand for
then under their respective contracts.

We are of opinion that by the terms of the contract
was necessary for the party to prove a condition precedent
to his right to recover for the conditions claimed, that he
was bound to the defendant's satisfaction by evidence of the
fact that there were no conditions, and his sub-limited
party; also that there were no conditions which might later
come into being to his sub-limited party; or to prove
that he had made satisfactory arrangements with the defendant
for reference to such conditions, to insure their payment. While
it is true that the evidence in this case which was offered by the
defendant to show that there were no conditions was to say of the
defendant's sub-limited party at the time of the trial; no evi-
dence was offered to prove that the condition had been waived the
defendant with any satisfactory evidence that there were no
conditions due or to become due later; nor was there any evidence
of any arrangement with the defendant with reference to the payment
of such conditions. We are of opinion, that under the terms
of its contract with the plaintiff, the furnishing of the satisfactory
evidence mentioned, or the making of an arrangement with the defendant
to insure the payment of the conditions of the plaintiff's sub-limited
party, was a condition precedent to the plaintiff's right to recover
and he could not be legally subjected to suit before compliance

whether or not the appellee can recover under the common counts, it is clear, that if he had filed a special count for the recovery of the commissions under the contract of agency in question it would have been necessary to have set out in such special count the conditions precedent mentioned, and aver a compliance therewith or a waiver of them, before a recovery could have been had under such count. It is apparent that the state of the proof disclosed by the record does not entitle appellee to recover the commissions claimed; and the judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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R H Sm Apr 9/12

210 I.A. 420

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

NOV 23 1917

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

2000

Gen. No. 6434

J. J. Kirby. appellee.

210 I.A. 420

vs

Appeal from Kankakee.

Louis Legacy et al

(John F. Judy et al appellants)

Niehau, J.

In this case J. J. Kirby the appellee filed a bill in equity in the circuit court of Kankakee County to foreclose a trust deed, given to Louis Legacy as Trustee, to secure the payment of notes, of which the appellee had become the legal holder. The land described in the trust deed consisted of a farm of 120 acres in Kankakee County. No question is raised as to the validity of the trust deed; and it is conceded, that the appellee is a bona fide holder for value of the notes in question. The contention in the case relates to the effect of a release of the trust deed, (which it is obtained, was obtained from the Trustee by fraud and misrepresentation) upon the rights of a subsequent purchaser for value, and the holder of a subsequent encumbrance. Upon a hearing of the case, the Chancellor found, that the release in question, was procured by means of fraud; and that fraud entered into its execution; and that it was therefore void; and entered a decree for the foreclosure of the Trust Deed in question regardless of the release. An appeal from this decree has been perfected by John F. Judy who is a purchaser for value of the land in question; and the Farmers & Merchants State Bank of Attica, Indiana, which is the holder of a subsequent encumbrance.

It appears from the evidence, that the appellant, John F. Judy on or about March 9, 1916, entered into a written contract with one John C. Norman by which, Judy agreed to trade an apartment building ~~property~~ property in Bloomington, Illinois, to Norman for the 120 acres of land mentioned, subject to the Legacy trust deed encumbrance, then amounting to \$6,000.00 and held by the appellee; and Norman

agreed verbally, to have the Legacy encumbrance renewed for another five year period. The legal title to the land mentioned at the time the contract was made, was in John C. Norman, but the actual owners of the land were James C. Norman, father of John C. Norman, and J. M. Hendrix. The Legacy Trust Deed had been given by Aaron Forney, a former owner of the land, on April 5, 1911 to secure the payment of four promissory notes, for the sum total of \$8,000.00; the notes were also payable to Legacy, and afterwards endorsed and transferred by Legacy to the appellee; two notes of \$1,000.00 each had been paid, leaving \$6,000.00 remaining of the encumbrance which was a lien upon the property at the time of the contract to trade, referred to. Previous to the time the contract to trade had been entered into, James W. Norman had written to the appellee Kirby, the holder of the \$6,000.00 encumbrance to get Louis Legacy's address, ostensibly for the purpose of getting a release of the lien of the Trust Deed from Legacy for the \$8,000.00 payment which had been made thereon. Kirby resided at Momence; and Legacy lived on a farm 5½ miles northeast of Momence. Kirby answered Norman's letter, giving Legacy's address. Afterwards about March 29, 1916 and before the consummation of the trade with Judy, Norman and Hendrix journeyed to Momence, and arranged with the appellee Kirby for a renewal of the \$6000 encumbrance for a period of five years. The appellee Kirby had new notes, and another Trust Deed to Edward P. Cleary, Trustee, drawn by his attorney, for the renewal of the Legacy encumbrance; and delivered them to Norman and Hendrix; these were to be executed by John C. Norman, and returned to Kirby. After the arrangement with Kirby for the renewal of the Legacy encumbrance by the execution of Cleary Trust Deed, Norman and Hendrix went to see Legacy, the Trustee. Before going out to see Legacy, they had a release of the Legacy Trust Deed prepared; two other men,

agreed verbally, to have the Legacy annuities continued for another five year period. The Legacy failed to pay the annuities at the time the contract was made, and the annuity was not paid. The actual owners of the land were James G. Norman, father of John G. Norman, and E. M. Hendrix. The Legacy Trust Deed had been given by Aaron Kirby, a former owner of the land, on April 5, 1911, for the payment of four promissory notes, for the sum total of \$1,000.00; the notes were also payable to Legacy, and were in arrears and transferred by Legacy to the appellee; the notes of \$1,000.00 each had been paid, leaving \$5,000.00 remaining of the annuities which was a lien on the property at the time of the contract as stated, referred to. Previous to the time the contract to trade had been entered into, James G. Norman had written to the appellee Kirby, the holder of the \$5,000.00 annuities to get Legacy's annuities, ostensibly for the purpose of getting a release of the lien of the Trust Deed from Kirby for the \$5,000.00 payment which had been made thereon. Kirby replied to Norman; and Kirby lived on a farm 5 miles northwest of Norman. Kirby testified that he had been in the possession of the trade about March 29, 1910 and before the consummation of the trade with Kirby, Norman and Hendrix journeyed to Norman, and arranged with the appellee Kirby for a renewal of the \$500 annuities for a period of five years. The appellee Kirby had two notes, and another Trust Deed to Edward G. Kirby, Trustee, issued by his attorney, for the renewal of the Legacy annuities; and delivered them to Norman and Hendrix; these were executed by John G. Norman, and returned to Kirby. After the arrangement with Kirby for the renewal of the Legacy annuities of the execution of Kirby Trust Deed, Norman and Hendrix went to see Legacy, the Trustee. Before going out to see Legacy, they had a release of the Legacy Trust Deed prepared; two other men,

Walter S. West, a real estate agent, and Harden E. Vail, a Justice of the Peace and Notary Public, with whom Legacy was acquainted went out with them; Vail going for the particular purpose of taking the acknowledgement to the release. The parties went out in an automobile, and met Legacy by appointment at the end of the so-called "Stone Road" leading to his farm; and Legacy there executed the release; and it was recorded in the office of the County Recorder at Kankakee, before the consummation of the trade with Judy, and before the purchase of the Cleary Trust deed and notes by the appellant, The Farmers & Merchants State Bank of Attica. The circumstances under which the release was executed by Legacy are related in his testimony on this point, which is as follows:

"I remember the occasion of signing the release. Mr. Vail, Mr. West, Mr. Hendrix, Mr. Norman and myself were present at the time. West had called me up and asked me to meet them at the end of the road. West said he had two men who wanted to see me about a new loan. When I met them they were all out of the automobile. Mr. West introduced Mr. Hendrix and Mr. Norman. Mr. Vail then told me they had a paper for me to sign. I told them "I did not like to help anybody get a new loan; I had a hard time to get a loan myself--- that when I got a \$5,300 loan they even wanted me to get the grocerman to sign with me; that when I sold I took an \$8,000 mortgage." West asked me if Kirby had the mortgage. I said "Yes, he has got \$6,000." He said "\$6,000 paid on it?" and I said "Yes." Mr. Vail started to read the paper. Read a little bit, then read again and then stopped again, done that three or four times. I don't know whether he read it all or not. He asked me to sign it again. I told him "I did not want to sign anything that I don't know what it is, that will put me in trouble", so Mr. Vail said, "It is nothing that will put you in trouble, nothing but a release deed." Of course I didn't know what a release deed meant, and Mr. Hendrix pulled a paper out of his pocket showing it to

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me and said, "Here is another paper like it that I got from another party," so I turned around to Mr. West and asked "If it was all right to sign the paper." Mr. West said "Yes; if you dont sign it we cant get a new loan," so I signed the paper."

It is evident from the testimony of Legacy, that he was somewhat reluctant at first, to execute the release because he thought he might get into trouble by signing it; but it was not because he thought that he was doing any wrong by signing, or that it might be used to the injury of Kirby. It does not appear however that he was induced to sign the release because of any misrepresentations or fraudulent representations. He was told by the parties mentioned, who came out to see him, that the paper which he was asked to execute was a release of the trust deed of which he was trustee, and he fully understood that it was such a release; and the parties also told him that they wanted the release for the purposes of a new loan; and he understood it in that way; what the parties told him with reference to the character of the paper, and the purpose they had in view in getting him to sign it, was all true, and hence he was not in any way misled thereby.

The fraud and wrong which was perpetrated in this case, was perpetrated by Norman and Hendrix by diverting the renewal trust deed and notes after their execution, from Kirby for whom they were intended, and converting them, and the proceeds of the sale thereof, to their own use and benefit. The evidence shows, that the renewal trust deed to Cleary after its execution was duly recorded, and thereupon the trade with appellant Judt was carried out; but Norman and Hendrix instead of returning the renewal trust deed and notes to Kirby negotiated them to the appellant, The Farmers & Merchants State Bank of Attica Indiana. The evidence is clear that both of the appellants, in their transactions with reference to the real estate in question, acted in good faith upon what was disclosed by the record concerning the condition of the title

which showed the release of the Legacy Trust Deed; and that they had no notice of any irregularity in its execution; and nothing appears of record, or in any other way, that could reasonably have had the effect of putting them, or either of them, upon inquiry concerning anything that might be wrong in its execution.

The law is well settled in this state that persons who deal with reference to the title to real estate have a right to rely upon what is disclosed by the record; and an innocent purchaser for value, who buys on the faith of the record, is protected to the extent of what the record discloses; and his rights are not affected by any interest in real estate which the record does not disclose, and of which he had no notice, no matter how meritorious such interest may be. *Thorpe v Helmer*, 275 Ill. 90; *Lenartz v Quilty*, 191 Ill. 174; *Ogle v Turpin*, 12 Ill. 148; *Gavagan v Bryant*, 93 Ill. 376.

We are of opinion therefore that the Legacy Trust Deed must be regarded as released, so far as the interests of the appellants are concerned, in the premises in question; and that therefore the appellee was not entitled to a decree of foreclosure and sale and cannot legally maintain a foreclosure suit against the appellants. The decree is therefore reversed, and the cause remanded with directions to dismiss the bill of complaint for want of equity.

Decree reversed with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT. { ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

TH Wm Apr 9/18

210 I.A. 421.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 12 1918

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6487.

210 I.A. 421

The People of the State of Illinois.

Defendant in error.

vs

Error to Lake.

Martin Svete, Plaintiff in error.

Dibell, J.

On February 21, 1917, an indictment was returned in the circuit court of Lake County against Martin Svete. It contained twenty counts, nineteen of which charged him with unlawfully selling intoxicating liquor in anti-saloon territory, and the twentieth with keeping a nuisance. There was a jury trial. During the trial the twentieth count was dismissed and there was a verdict finding defendant guilty under the second, third, fourth, fifth and sixth counts. A motion by defendant for a new trial was overruled and he was fined \$75.00 and sentenced to imprisonment for twenty days under each of said counts and ordered confined in the county jail till the fine and costs were paid. He sued out this writ of error to review said judgment.

At the close of the People's evidence in chief, defendant moved to instruct the jury to find the defendant not guilty for certain specified reasons, and it is claimed that the court, in passing on that motion, used language which would indicate to the jury an opinion by the court that defendant had been proven guilty. It is argued that this statement by the court was harmful and erroneous, under the principles laid down in *Weyrich v People*, 89 Ill. 90, *Lycan v People* 107 Ill. 423, *Marzen v People* 173 Ill. 43, *Cunningham v People* 195 Ill. 550, and *Briggs v People* 319 Ill. 330. The State's Attorney contends that the question is not presented for decision by this record.

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Defendant did not object or except to the remark made by the court in his ruling on said motion. Defendant filed written points in support of his motion for a new trial and did not therein refer to any improper remarks by the court. Neither did he assign for error the overruling of said motion for a new trial. Under the principles announced in *Yarber v C. & A. Ry. Co.* 255 Ill. 539, defendant waived this alleged error when he did not include the same in his written reasons, contained in his motion for a new trial. The court there said:

"Under the practice in this state, decisions of the court made in the progress of a trial upon instructions, objections to evidence, or other matters of law arising in the cause which have been incorporated in a bill of exceptions, may be assigned for error and reviewed by an appellate court without any motion for a new trial. They are not waived by making a motion for a new trial if such motion is submitted without any points stated in writing. But if a motion is made for a new trial and the grounds thereof are stated in writing, the party is limited to those reasons and all other errors are deemed to have been waived."

The alleged improper language of the trial court is therefore not before us for review, but if there was any error therein it has been waived.

When the verdict was first returned it found the defendant guilty under five counts of the indictment, without specifying which ones. The court orally told them to return to the jury room and amend their verdict by giving the numbers of the counts under which they found the defendant guilty. It is now urged that it was error to give the jury that oral direction. That objection was not made at the time, but the objection was to having the jury alter their verdict, and in the motion for a new trial it is not claimed that it was error to give the

oral directions, but only that it was error to direct them to amend. We think it obvious that the court properly sent the jury out to specify in their verdict under which of the counts they convicted, and that the point that the direction was oral was not saved by the record. It is argued that the judgment is excessive. We are of opinion that this point is not well taken. Other errors are assigned, but they are not argued and therefore are waived.

The judgment is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

TP H Dan Apr 13, 1872

210 I.A. 437

473

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

TP - 14

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6518.

Henry Guth, appellee.

210 I.A. 437

vs

Appeal from Peoria.

George Hass, appellant.

Dibell, J.

Appellant brings before us for review a judgment of the court below for \$700. recovered by appellee against appellant in an action on his case for damages for injuries to the horse, buggy and person of appellee by a collision with appellant's automobile, alleged to have been caused by the negligent running of said automobile in the night time at a street intersection in the city of Peoria, which automobile appellee alleges was driven by appellant, while appellant claims that said automobile at that time was not driven by him or engaged in his business nor driven by anyone then in his employ. Appellant alleges slight errors in rulings on evidence, but we find those contentions not sustained. Appellant's main contentions are that he was not driving the automobile and that the damages awarded are excessive, both ~~are~~ questions of fact which were submitted to a jury.

Rule 12 of this court, 137 Ill. App. 634, requires the assignment of errors to be written upon or attached to the record. We do not find any assignment of errors written upon or attached to this record. Without such an assignment of errors upon the record, no question is presented for review, and the deficiency is not supplied by printing in the abstract an assignment of errors not in fact upon the record, and this defect will be acted upon by the court of its own motion when discovered. *Benneson v Savage*, 119 Ill. 135; *Aetna Life Ins. Co. v Sanford*, 197 Ill. 310; *Metropolitan Life Ins. Co. v People*, 205 Ill. 370; *Kominski v People* 219 Ill. 595; and other authorities cited

2
by us in *Butters v C. B. & Q. R. R. Co.* 154 Ill. App. 375.

There is an assignment of errors printed in the abstract, which in that respect incorrectly represents the state of the record. If we were to consider that assignment as if attached to the record, another difficulty appears. It is not there assigned that the court erred in overruling the motion for a new trial. A supposed error not assigned, is waived, and is not open to review in this court. This is held in many cases, of which it is sufficient to cite *Anglo-Wyoming Oil Fields v Miller*, 316 Ill. 272 and *Wargoner v Baether*, 367 Ill. 33. The sufficiency of the evidence to support the verdict or judgment in a case tried by a jury can only be raised by a motion for a new trial. *Yarber v C. & A. Ry. Co.* 335 Ill. 589. As appellant did not assign the action of the court in overruling his motion for a new trial as an error the questions which appellant has argued are not open to review before us on this record.

The judgment is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. { SS.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

6492

7032

210 I. A. 449
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES; Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6492.

Agenda No.47/

John W. Gray,
Appellee,

210 I.A. 449

-vs-

Appeal from County Court,
Will County.

City of Joliet,
Appellant.

Carnes, P. J.

John W. Gray, appellee, sued the city of Joliet, appellant, in the county court of Will County, and filed as his declaration the common counts in assumpsit, and therewith a bill of particulars as follows:-

" To labor and services rendered for the City of Joliet at its request in making and spreading assessment and preparing assessment roll for the improvement of Bluff and Railroad streets by paving under City Ordinance No.2583 Warrant No.547 from July 13, 1912 to August 26, 1912----- \$ 925.00

"To postage and stationery furnished----- 5.00

"To labor and services rendered for the City of Joliet at its request making and spreading assessment and preparing assessment rolls for the improvement of Center Street by constructing a sewer under City Ordinance No.2619 Warrant No.370, from April 30, 1913, ----- 45.00

Total,----- 975.00 "

Also an affidavit of claim under section 55 of the Practice act, in which he said that this demand was for labor and services performed and supplies furnished defendant in spreading assessment rolls for improvement work in the city of Joliet at its request. Several pleas were filed which were stricken off on motion of the plaintiff because of insufficiency, as the court held, of an affidavit of meritorious defense required under said section 55.

2001A.448

John W. Gray,

Appeal from County Court,
Will County.

-vs-

City of Joliet,

John W. Gray, appellee, sued the City of Joliet, ap-
pellant, in the County Court of Will County, and filed as his
declaration the common counts in assumpsit, and therein in a

bill of particulars as follows:-

"To labor and services rendered for the City of

Joliet at its request in making and spreading assessment
and preparing assessment roll for the improvement of
Bluff and Railroad streets by paving under City Ordinance
No. 2583 passed July 13, 1912, to August 30, 1912, ----- \$ 250.00

"To postage and stationery furnished----- 5.00

"To labor and services rendered for the City
of Joliet at its request making and spreading
assessment and preparing assessment roll for the
improvement of Center Street by constructing a
sewer under City Ordinance No. 2612 passed July 13, 1912,
from April 30, 1912, ----- 10.00

also an affidavit of claim under section 33 of the Practice
act, in which he said that his demand was for labor and

services performed and supplies furnished defendant in spreading

ing assessment rolls for improvement work in the City of Joliet at

its request. Several pleas were filed which were stricken off on mo-

tion of the plaintiff because of insufficiency, as the court held, of an

affidavit of meritorious defense required under said section 33.

Finally there was a jury trial, both parties appearing and introducing evidence, though there was no plea on file. The defendant during the trial filed another affidavit of defense in which it did not state as one of the grounds that nothing had been collected under the assessments in question. At the close of the trial the court denied the defendant's motion for a directed verdict, and on motion of the plaintiff directed one for him, leaving the amount of damages to be ascertained by the jury. A verdict of \$870. was rendered. The court overruled the defendant's motions for a new trial, and in arrest of judgment, and entered judgment on the verdict, from which the city prosecutes this appeal. One of its errors assigned is that the verdict of the jury is contrary to law.

It appears from evidence introduced by appellee that each of the ordinances under which the local improvement was to be made contained the provision authorized by section 94 of our Local Improvement act (J & A pgf.1489) for the payment of all ~~gas~~ costs and making and collecting the assessment out of moneys raised therefrom. (We take judicial notice that appellant has a population of less than one hundred thousand.) It also appears that each of the two assessments in question was abandoned and nothing whatever collected. Appellee inclosing his brief says he was hired by appellant to perform certain skilled services and did all the work legally required of him, and spent upwards of a hundred days in doing it; that through no fault of his appellant abandoned and discontinued said improvements and refuses to pay him reasonable fees for his services, which the proof shows were worth the amount of the verdict.

Finally there was a jury trial, both parties examining and introducing evidence, though there was no plea on file. The defendant during the trial filed another affidavit of defense in which it did not state as one of the grounds that nothing had been collected under the assessments in question. At the close of the trial the court denied the defendant's motion for a directed verdict, and on motion of the plaintiff directed one for him, leaving the amount of damages to be ascertained by the jury. A verdict of \$870. was rendered. The court overruled the defendant's motions for a new trial, and in arrest of judgment, and entered judgment on the verdict, from which the city prosecutes this appeal. One of its errors assigned is that the verdict of the jury is contrary to law.

It appears from evidence introduced by appellee that each of the ordinances under which the local improvement was to be made contained the provision authorized by section 94 of our Local Improvement Act (see p. 1459) for the payment of all ~~extra~~ costs and making and collecting the assessment out of money raised therefrom. (We take judicial notice that appellee has a population of less than one hundred thousand.) It also appears that each of the two assessments in question was abandoned and nothing whatever collected. Appellee in his brief says he was hired by appellee to perform certain skilled services and did all the work legally required of him, and spent upwards of a hundred days in doing it; that through no fault of his appellee abandoned and discontinued said improvements and refused to pay him reasonable fees for his services, which the proof shows were worth the amount of the verdict.

The question on the merits is whether the city is liable in this action under that assumed state of facts. It is held in *The People ex rel v. Village of Hyde Park*, 117 Ill. 462- that where a village board determines that improvements undertaken shall be paid for by special assessment it excludes any other mode of payment. That case was cited in *City of Chicago v. Hayward*, 176 Ill. 130, where it is said payments may be made out of general funds by special taxation or by special assessment, and the adoption of either mode by an ordinance of the city excludes the idea of payment in any other manner. It was held in *Conway v. City of Chicago*, 237 Ill. 173, that where a city has neglected or refused to collect the assessment assessment will not lie in favor of a contractor for work done on the improvement; that there could be a recovery in that action only where the assessment had been collected by the city and nothing remained to be done except to pay it to the party entitled thereto. These principles are re-affirmed in *City of Chicago v. Thomason*, 259 Ill. 322. In *Price v. City of Elgin*, 257 Ill. 63, 68, it is said- "The city cannot be made generally liable by mere evasion or neglect of duty on the part of its officers, and its only duty was to make and collect an assessment for the benefit of the plaintiff." Evidence was introduced on the trial on the questions whether the assessment was properly made, what was the value of the work done, and whether the plaintiff agreed to forego any claim against the city in consideration of his being employed to make a subsequent assessment. Under the law as announced in the cases above cited these questions seem immaterial. The mere fact that each assessment was abandoned or defeated and no money collected on it precludes recovery.

The question on the merits is whether the city is liable in this action under the assumed state of facts. It is held in The People ex rel v. Village of Hyde Park, 119 Ill. 468- that where a village board determines that improvements undertaken shall be paid for by special assessment it excludes any other mode of payment. That case was cited in City of Chicago v. Hayward, 176 Ill. 180, where it is said payments may be made out of general funds by special taxation or by special assessment, and the adoption of either mode by an ordinance of the city excludes the idea of payment in any other manner. It was held in Conway v. City of Chicago, 287 Ill. 128, that where a city has neglected or refused to collect the assessment on property will not lie in favor of a contractor for work done on the improvement; that there could be a recovery in that action only where the assessment had been collected by the city and nothing remained to be done except to pay it to the party entitled thereto. These principles are re-affirmed in City of Chicago v. Thompson, 359 Ill. 323. In Price v. City of Elgin, 327 Ill. 62, 63, it is said: "The city cannot be made generally liable by mere evasion or neglect of duty on the part of its officers, and its only duty was to make and collect an assessment for the benefit of the plaintiff." Evidence was introduced on the trial on the questions whether the assessment was properly made, what was the value of the work done, and whether the plaintiff agreed to forego any claim against the city in consideration of his being employed to make a subsequent assessment. Under the law as announced in the cases above cited these questions seem immaterial. The mere fact that each assessment was abandoned or defeated and no money collected on it precludes recovery.

We presume it is immaterial whether the plaintiff knew the condition in the ordinances when he performed the work, but he must have known the provisions of the ordinances under which he was spreading assessments, and it must be presumed that he knew the law applicable to those provisions. The item (\$5.00) for postage and stationery was a part of the same transaction and a part of the cost of making the assessment.

but it is said under the pleadings the judgment was properly rendered because in appellant's last affidavit of merits it did not mention this defense and therefore it was waived. As we have before seen, the parties went to trial with no plea on file. There was no objection to proceeding with the case without an issue joined; therefore that error is waived. *Devine v. Chicago City Ry. Co.*, 237 Ill. 278.

There was an effort to support the plaintiff's demand by evidence. In case of a default, if the plaintiff undertakes to prove his demand and the evidence introduced shows that he has no legal claim against the defendant, he is not entitled to a judgment. It may be that a defendant cannot avail himself of a legal defense not set out in his affidavit of merits if he files one, but that is quite different from saying that a failure to set out a defense in an affidavit of merits or failure to plead and file any affidavit of merits entitles the plaintiff to a judgment on evidence that shows he has no legal demand.

The judgment is reversed, and, as there can be no recovery, the cause is not remanded.

Reversed.

We presume it is immaterial whether the plaintiff knew the con-
dition in the ordinances when he performed the work, but as must
have known the provisions of the ordinances which he was
spreading assessments, and it must be presumed that he knew the
law applicable to those provisions. The item (\$4.00) for
postage and stationery was a part of the same transaction and a
part of the cost of making the assessment.

but it is said under the pleading the judgment was pro-
perly rendered because in appellant's last affidavit of merits
it did not mention this defense and therefore it was waived. It
we have before seen, the parties went to trial with no plea on
file. There was no objection to proceeding with the case without
an issue joined; therefore that error is waived. *Reverie v. Chicago*
City Ry. Co., 237 Ill. 378.

There was an effort to suggest the plaintiff's demand by
evidence. In case of a default, if the plaintiff undertakes to
prove his demand and the evidence introduced shows that he has no
legal claim against the defendant, he is not entitled to a judgment.
It may be that a defendant cannot avail himself of a legal defense
not set out in his affidavit of merits if he files one, but that
is quite different from saying that a failure to set out a defense
in an affidavit of merits or failure to plead and file any affir-
mativ of merits entitles the plaintiff to a judgment on evidence
that shows he has no legal demand.

The judgment is reversed, and, as there can be no recovery,
the cause is not remanded.

Finding of Facts:

We find that the entire demand of appellee is for services and supplies furnished appellant in making assessments under its two ordinances, each providing for a local improvement by special assessment in accordance with an act of the general assembly of this state entitled "An Act Concerning Local Improvements", approved June 14, 1897, in force July 1, 1897, and the amendments thereto; that each ordinance provided for the expense thereof and the expense of making, levying, and collecting the special assessment for said improvement from the fund raised from such assessment, and that proceedings under each of said ordinances were abandoned by appellant, and that no money was collected in either.

Findings of Facts:

We find that the entire demand of appellee is for services and supplies furnished appellant in making assessments under its two ordinances, each providing for a local improvement by special assessment in accordance with an act of the general assembly of this state entitled "an act concerning local improvements", approved June 14, 1897, in force July 1, 1897, and the amendments thereto; that each ordinance provided for the expense thereof and the expense of making, levying, and collecting the special assessment; for said improvement from the fund raised from such assessment, and that proceedings under each of said ordinances were abandoned by appellant, and that no money was collected in either.

STATE OF ILLINOIS, }
SECOND DISTRICT. { ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

6496

210 I.A. 450

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

14. 1. 1. 1. 1.

David Thede, doing business
as Thede Bros.,

Appellee,

210 I.A. 450

-vs-

Appeal from Peoria,

Jefferson Deposit Company,

Appellant.

Opinion, P. 1.

This is an action on the case brought by David Thede, appellee, against Jefferson Deposit Company, appellant, to recover under section 29 of our Workmen's Compensation act \$474.50, the amount of compensation paid by appellee under the act to his employee, Alonzo Christian, who it is claimed was injured by the negligence of appellant. If appellant is liable there is no question about the amount. A jury trial resulted in a judgment for that sum. The controlling questions presented on this appeal are whether appellant was guilty of negligence which was the proximate cause of Christian's injury, and whether Christian was in the exercise of ordinary care for his own safety at the time in question.

Appellee was engaged in the teaming business; Christian was in his employ. Appellant maintained and operated an office building in Peoria. One of the tenants was the Peoria Journal whose press rooms were in the basement of the building. The print paper for the Journal's use was habitually transported by appellee's men to the building on a two horse wagon. In the rear of the building abutting a public alley eighteen feet

2101A.450

It is a very common occurrence in the history of the world, that a great many of the most important events, which have shaped the course of human progress, have been the result of the action of a few individuals, who, by their genius, courage, and perseverance, have been able to overcome the opposition of the masses, and to bring about a new order of things. This is the case with the history of the United States, and it is the case with the history of every other nation. The great men of the world are the ones who have made the world what it is today, and it is to them that we owe the progress which we have made. They are the ones who have been able to see the future, and to bring it about. They are the ones who have been able to overcome the opposition of the masses, and to bring about a new order of things. This is the case with the history of the United States, and it is the case with the history of every other nation. The great men of the world are the ones who have made the world what it is today, and it is to them that we owe the progress which we have made.

The history of the United States is a history of the action of a few individuals, who, by their genius, courage, and perseverance, have been able to overcome the opposition of the masses, and to bring about a new order of things. This is the case with the history of the United States, and it is the case with the history of every other nation. The great men of the world are the ones who have made the world what it is today, and it is to them that we owe the progress which we have made. They are the ones who have been able to see the future, and to bring it about. They are the ones who have been able to overcome the opposition of the masses, and to bring about a new order of things. This is the case with the history of the United States, and it is the case with the history of every other nation. The great men of the world are the ones who have made the world what it is today, and it is to them that we owe the progress which we have made.

wide there was an opening or doorway about six feet wide and seven feet high, three and a half feet above the surface of the alley. An hydraulic elevator ran from the bottom of this ledge at the bottom of the doorway the thickness of the wall (about two feet). The elevator was used only for freight and only by those bringing heavy materials to or taking them from the tenants of the building, and was always operated by whoever might so use it.

There were two corrugated iron gates of about the same size for the purpose of closing the doorway, arranged one above and the other below the opening, meeting in the center when closed. To open or close them it was necessary to work by hand. On the day in question Christian with two other employees of appellee was hauling large rolls of paper to the Journal company, which were taken to the basement by means of an elevator. The men were using a flat wagon upon which could be placed five of these rolls crossways, taking up practically the entire space of the wagon. The driver sat on the front roll, and to get to the rear of the wagon he must either walk over the rolls or climb from the wagon. Christian and the other two men had hauled two such loads of paper to the Journal in the forenoon of the day. After delivering their second load they left the gates open and the elevator up flush with the ledge or bottom of the opening. They returned with a third load shortly after noon, Christian driving. The other two men got off the wagon before they reached the doorway for the purpose of blocking the wagon, there being a slight down grade of the pavement away from the building. When the wagon was backed up it took up the entire space of the opening so that the only way to get to the ledge

from the front was to go over the rolls of paper, or get down into the alley and climb up at the rear. Christian testifying for appellee at one time says that as he loaded the wagon up and before he started to walk back he saw that the elevator was down at the bottom. At another time he says he did not notice it was down until after he had started to walk back. The five rolls of paper were each seven feet long and about three feet in diameter. After Christian got his wagon in position to unload, he got up and started to walk back over the rolls of paper to the ledge or bottom of the doorway where he could stand and bring the elevator to the top. It had been snowing, and the top of the rolls was slippery. When he reached the middle or the third roll he slipped on the snow and fell forward and into the shaft, receiving the injury complained of.

The only negligence appellant charged or argued is that it failed to properly protect this doorway, and to sustain its contention appellee introduced evidence tending to show that it was somewhat difficult to close the doors. Christian was perfectly familiar with the situation and had left them open after he delivered his second load, probably anticipating his return with this third load. Appellee seems to assume that Christian would have closed the doors if they had not been difficult of operation. There was no reason for closing them between two trips of appellee's men to deliver goods. The opening was three and a half feet above the surface of the alley, and therefore not dangerous to pedestrians or teams using the alley. The doors had to be open when loading or unloading goods. Such an accident might happen at any such time if the workman fell off his load. Appellant was not charged with a duty to provide a

safe place for a workman to alight if he fell. The danger was obvious at any time when the doors were open and marons were unloading. It was the duty of the workman to guard against it. The issue is for the jury and we must treat it as determined in determining this question of negligence. The same is thought but suit has been brought by Christian. Under circumstances such as these a plaintiff cannot recover for injuries occasioned by danger of which he had notice. Calvert v. Springfield Light Co., 281 Ill. 290; Eepho v. The Merchants Loan & Trust Co., 166 Ill. App. 511.

There was nothing obscure about the danger. Christian had not only worked at that place in the forenoon of the same day, but had worked there often before and knew the situation thoroughly. He failed to guard against a known and obvious danger, and his injury resulted from his want of exercise of required care.

Other errors are assigned and argued. The question is raised whether the declaration states a cause of action, but we conclude that on a consideration of the facts taken most strongly for appellee he is not entitled to a verdict; therefore the judgment is reversed without discussing other errors assigned.

Reversed.

Finding of Facts:

We find that appellant was not guilty of the negligence charged in the declaration, and that Alonzo Christian, the employe of appellee, was guilty of negligence contributing to the injury complained of.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



6510

4037

210 I.A. 452

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

L. O. Hagleton, Admr., etc.,

210 I.A. 452

-vs-

Appellant,
Appeal from circuit court
Peoria County.

Katherine Barnett,

Appellee.

Carnes, P. 2.

This is a citation proceeding for the discovery of assets under section 81 of our Administration act (J.S.A. pgf. 180).

The appellant, L. O. Hagleton, administrator with the will annexed of the estate of Louise DeLong, deceased, filed in the probate court of Peoria county his statement under oath that he believed Katherine Barnett, appellee, had in her possession and refused to deliver to him, thirteen bonds issued by the First Methodist Episcopal Church of Peoria, described by number, of the aggregate face value of \$1000; also one promissory note of L.C. Hinckle and Dr. J.C. Roberts, principal \$1020.; and another promissory note of James Jordan, principal \$3500.; also other sums of money, the property of said estate. Citation issued. There was a hearing before the probate judge and a finding by him that the property described in the petition belonged to appellee and was no part of the estate of deceased, and a judgment dismissing the petition, coupled with an order that \$500. funds of the estate held by appellee for the purpose of burial expenses and work on the cemetery lot in Schenectady, New York, where deceased was buried, should be held by her and accounted for to the court.

The administrator appealed to the circuit court, where the parties appeared; also appeared Artemus D. Watson, an heir of

testimony first introduced on the hearing in the circuit court. Afterwards, April 14, the parties appeared, presented, and the court passed on objections so noted. He held that appellee was a competent witness because she was brought into court and required to show cause, and also that her testimony was competent because objection to it is waived by the objection interposed that it is immaterial, incompetent and irrelevant; that if she was incompetent in the inception that had been waived by subsequent objections; also, that her testimony should be held competent because it was all read to the court without any question being raised relative to her competency as a witness; that objection was first made after all the testimony had been submitted to the court and after the court had passed upon the merits of the case.

Excluding appellee's testimony as a witness in her own behalf, the record shows that she is a dressmaker about forty years old residing at Peoria, Illinois, where Louise De Long, appellant's testate, died in May 1916, aged about seventy-five years, leaving an estate as claimed by appellant of about \$13,000. Mrs. De Long and her husband became acquainted with appellee in 1905. Their business and social relations were intimate. They lived near each other and appellee often rendered them aid in caring for them. This condition continued until July 1911, when Mr. DeLong, the husband, died possessed of considerable property, which all passed to his widow, he having no near relatives. She was at the time seventy years old, in infirm health, suffering with chronic tic douloureux. Her husband's death left her alone, and she went to appellee's house after the funeral and

stayed there six or seven weeks, appellee assisting her in getting her things and business ready to take a trip to California. Mrs. DeLong went to California and stayed there until May 1912; appellee in her absence acting as her agent in caring for property she had in Peoria. When she came home she went to live with appellee permanently.

Before her husband's death she had become acquainted with E.C. McCabe, an attorney of Peoria, in whom her husband had confidence. She consulted with him in the settlement of the estate and about the disposition of her property by will, which he finally, before she went to California, drafted for her. It contained a bequest to appellee of \$800. and she told McCabe that she owed appellee a great deal for taking care of her and wanted to give her something besides what would show in the will; that she had a relative that would be an officious meddler and she did not want any contest or trouble over her estate, and did not want a large amount put in the will for appellee for that reason; that she expected to pay for her care and nursing; that appellee was up night and day in her home, and she could not get so good care in the hospitals or anywhere else; that she expected to pay appellee for it and expected to pay it in her lifetime, and to pay it from time to time as she got her property sold and reduced to cash; but she wished appellee to have the \$800. mentioned in the will as a gift outright in addition to any service rendered her.

Dr. J.C. Roberts was the DeLong's family physician and of Mrs. DeLong until her death. He had also been employed by appellee and enjoyed the full confidence of these women. Apparently on his suggestion McCabe's services were dispensed with and L.C. Hinckle, an attorney of Peoria, was substituted as the

legal adviser of Mrs. DeLong. There was concerted action between the doctor and this lawyer from that time on. The assets of Mrs. DeLong's estate at the time of her death as claimed by appellant were nearly half in promissory notes of this doctor and lawyer.

In January 1913 Hinckle drafted a will for Mrs. DeLong, the contents of which does not appear, and later he drew up another will for her, which was executed March 17, 1914. This will is the one probated, but it does not appear in the record here. Hinckle was one of the attesting witnesses, and appellee, her son, and Dr. Roberts were among the legatees. When Hinckle first testified in this case he swore that Mrs. DeLong was not competent to transact business for three years before her death, which included the date of this will. He was sharply cross-examined about loans that she had made him and business that he had transacted with her during that period, and after leaving the witness stand he returned and asked to correct his testimony, saying that he thought Mrs. DeLong was competent to make a gift at the time she made the will, and up to two years before her death.

Of the property in controversy here the Jordan loan-\$3500.- was made in the spring of 1913. The Methodist Church bonds were procured the following summer and fall, and the Hinckle-Roberts note was executed in January 1916. All of these transactions were conducted by appellee, Dr. Roberts, and Hinckle acting together as agents of Mrs. DeLong in the care of her estate.

A creditable, disinterested witness testified that in February 1916, Mrs. DeLong was strong mentally and then asked her

to write on a printed form- said she wanted appellee to have some things and did not want appellee's husband to have them; that at Mrs.DeLong's dictation she wrote a paper, which was introduced as exhibit 19, and read- " Feb.26, 1916. Received from Mrs.Kate Barnett value in full for all notes, bonds, checks, certificates, money and valuables of all descriptions I leave in her possession," which she, Mrs.DeLong, then signed, and at the same time showed the witness the securities herein question and said that she had given appellee personally those papers and she would have a great deal more than those. Edwin Barnett, appellee's son, testified that he is a physician and surgeon located at Chicago, twenty-two years old; that he was home from his school at Christmas 1914; that Hinckle came to the house and he heard him ask Mrs.De Long for some money to make a loan, and Mrs.DeLong objected, saying she wanted to buy some city bonds for appellee because she understood that city bonds if she gave them into appellee's possession would belong to her, and Hinckle told her that he had the very thing she wanted, mentioning the Methodist church bonds, that were like city bonds; and appellee could hold them and they would be her possession; but he was anxious to have some money for the loan he mentioned, and asked Mrs.DeLong why she did not take her money from the Illinois Valley Trust Company and put it into church bonds; and told her that another way she could give appellee things was to loan money to some one and have the note payable to themselves and endorsed on the back, and that would be the property of the one holding the notes, and it was not necessary that such things be scheduled in the will when filed; that Mrs. DeLong said she wanted to make appellee a gift and was willing to take the church bonds and notes made out as he suggested so

that they would be the property of whoever held them. Mrs. De Long said that was a new idea to her, but it seemed a good suggestion.

Excluding the testimony of appellee as a witness as to all matters that occurred in the lifetime of Mrs. DeLong there remains evidence that Mrs. DeLong, soon after her husband's death, determined to give appellee a considerable part of her property in some way other than by provision in her will; that afterwards she had a part of her property converted into securities that would pass by mere delivery so that she might accomplish that purpose; that she understood there must be a delivery of the securities in her lifetime; that she declared a few months before her death that she had given those here in question to appellee; that they were in appellee's possession after Mrs. DeLong's death. We conclude that these facts support the conclusion that the securities in question were delivered to appellee by Mrs. DeLong and were in her possession and under her sole control in Mrs. DeLong's lifetime. O'Connor v. Messinger, 183 Ill.App.1.

Appellee was a competent witness to testify to any pertinent matter or thing occurring after the death of Mrs. DeLong. Dr. Roberts, and Hinkle, the attorney, each testified to various matters tending to show that these securities were not claimed by appellee until sometime after Mrs. DeLong's death. They also testify that appellee insisted that the will left by Mrs. DeLong should not be filed, but that a page of a former will should be substituted so as to make her the principal legatee; that Hinkle refused to be a party to any such transaction and appellee was very angry. Appellee testified, in substance, that Dr. Roberts told her that Hinkle was going to demand a large sum of her as a consideration for testifying favorably as an attesting witness

to the will; that she would see Hinckle, and the doctor would be present, and he, Hinckle, would claim that a part of the sum he demanded was to be given the doctor, but she must not believe that, because anything that he, the doctor, might get in the transaction he would give her. She testified that she did meet both of those men and Hinckle proposed that he would substitute another sheet in the will making her practically the sole legatee if she would give him certain of the securities that he mentioned; that if she would not do that he would testify as a subscribing witness to the will that the testatrix was not of sound mind when she executed it, and that would leave all the property to go to Mrs. DeLong's heirs; that he could make terms with the heirs if he could not with appellee. The son of appellee testified to a conversation that he heard between her and Dr. Roberts about the transaction, corroborating appellee in her statements. It is clear that either appellee and her son, or Dr. Roberts and Hinckle are guilty of deliberate, wilful perjury in their testimony about that transaction. Any court or jury believing what either side swore to as to that would entirely discredit the entire testimony of the other two witnesses. We cannot say from a reading of the record which should be believed. It is peculiarly a case for the application of the familiar rule that the credibility of witnesses can be best determined by those seeing them and hearing them testify. The probate judge and the circuit judge each had that advantage and came to the same conclusion. We cannot, from a reading of the record, say that they were mistaken.

Whether appellee's testimony as to occurrences in the lifetime of the deceased should be excluded is an interesting question, but not, in our judgment, controlling. Although she

was cited under the statute to appear, she did not, for that reason alone, become a competent witness in her own behalf. By the terms of the statute she might or not be examined by the court. The court was not required to examine her. *Kepple v. Crabb*, 152 Ill. App. 149; *Merchants Loan & Trust Co., v. Egan*, 143 Ill. App. 572. In *Rinard v. Lesley*, 143 Ill. App. 450, it was held that a failure to permit a party cited under this statute to testify at her own request was not error; that the question was left by the statute to the discretion of the court. We concur in that view of the law, but it is not clear that the record before us presents that question. A transcript of her testimony given in the probate court was read without objection. There was a stipulation entered into before that, that either party might object, but it seems from the recital of the trial court, which we think is sustained by the record, that the court's attention was not called to any question concerning her competency as a witness, or the competency of her testimony, until after the entire testimony was in and he had indicated his decision on the merits. This method of procedure was agreed to by counsel and neither party can here complain of it, but the court does not seem to have acquiesced in that method of trying the case. Perhaps he was not bound to. That question is not much discussed by counsel here and we will not undertake to go into an examination of the authorities on it. If her evidence as to matters occurring in the lifetime of deceased and her transactions with the deceased is competent and to be considered like that of a disinterested witness, little, if any, question is left that there was an executed gift to her of the property in question. But we rest our decision on the ground before stated, that there was other competent sufficient evidence of an executed gift.

was offered under the act and he was not allowed to cross-examine the witness. The court in the case of *People v. [illegible]*, 100 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Appellant's counsel devote considerable space in their brief to the proposition that a fiduciary relation existed between appellee and the deceased, and that the gifts, if they were executed, should be held the result of undue influence. They also contend that at the time when the gifts are claimed to have been made deceased was not of sufficient mental capacity to transact business. We find in the record sufficient evidence supporting the conclusion that Mrs. DeLong was at the time in question a woman of vigorous intellect, perfectly understanding what she was doing, and acting freely and intelligently in the execution of a plan that she made years before her death.

The receipt signed by Mrs. DeLong in February 1916, was introduced in evidence in the probate court, there examined by the court and attorneys, and lost. Appellant strenuously objected to the introduction of its copy on the trial in the circuit court and argues that it was lost through appellee's fault and because there were indications in the handwriting of the original receipt prejudicial to appellee. We think the evidence fairly shows the loss of the receipt was without the fault of appellee and furnished a sufficient ground for the introduction of a copy.

There is no question that Mrs. DeLong in her lifetime gave appellee \$500. with directions as to its expenditure in paying her burial expenses and improvements on the cemetery lot. Appellant in his statement of facts here states that as the fact, but locates the time different from that stated by appellee. It appeared on the trial in the circuit court that a part of this money had been expended by appellee and a part was still in her possession. The court directed that as to the balance of said sum- \$300. which she holds as trustee- that she shall within

six months complete the improvements and report to the court her expenditures in the premises, but shall not take credit for any compensation except her actual expenses, and should bring into court with the report the balance remaining after the payment of said expenditures, to be turned over to the administrator. Appellant says the court had no power to create a trust, which is true. The order did not create one- it simply recognized one that had been created by Mrs. DeLong. There was some evidence tending to show that any balance unexpended of this fund remaining in appellee's hands was to become her property. She assigns no cross error; therefore the only question is whether the estate was harmed by the order. We cannot see that it was, and if that part of the proceeding was informal it should not be held reversible error.

It is objected that the son of appellee was not a competent witness because it is said he was an interested party. It does appear that he is a legatee named in the will. Apparently he was testifying against his pecuniary interest. It is well settled law that an interested party may so testify.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6519

Reg 47381
210 I.A. 475

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

2

2

A.D. Chatelle,
Appellant,
-vs-

210 I.A. 475

Appeal from Jo. Daviess County.

Illinois Central Railroad
Company,
Appellee.

Garnes, P. J.

In June 1915, appellant, A. D. Chatelle, lived in the village of Warren, Illinois. Appellee's railroad runs east and west directly through that village. A public highway runs north beyond but near the west boundary of Warren and about one mile west of its north and south main street. Appellant started from Warren to drive to Burlington, Wisconsin, in an automobile with three other men. He was sitting on the front seat with the driver. He was not the owner or in control of the car, but the guest of the other members of the party. They drove west to that highway and then turned to cross the railroad about half a mile from there they turned. On that half mile the view west is at points obstructed by buildings and other obstacles, but a train from the west could be seen the last sixty feet of the highway before crossing the tracks. When the automobile, running at about fifteen miles an hour, reached the crossing it was struck by appellee's east bound through passenger train running from forty to fifty miles an hour. The automobile was wrecked and Appellant hurt. He brought this action on the case for injury to his person alleging in one count of the declaration negligence of the defendant in running its train at a high and dangerous rate of

speed approaching said highway crossing without ringing a bell or sounding a whistle, in other counts wilful and wanton negligence in so running its train, and in another count he plead an ordinance of the village of Warren limiting the speed of passenger trains to ten miles an hour and alleged that he assumed that the defendant in bringing its trains into the village would run at a rate of speed enabling it to comply with said ordinance, but the defendant was at the time in question about eighteen feet west of the village of Warren, running at so high a rate of speed that it could not on reaching the village do so.

A demurrer to this last mentioned count was sustained. Error is not assigned on this action of the court and no such ordinance was offered in evidence. The general issue was plead to the other counts. There was a trial and a verdict of not guilty, accompanied by a special finding that of the jury that the bell on the locomotive was continuously ringing from a point eighty rods before the highway in question was reached. Judgment for the defendant followed, from which this appeal is prosecuted.

Appellant argues (1) that the special finding is against the weight of the evidence; (2) that the court erred in giving an excessive number of instructions for the defendant, and especially in giving so many instructions closing with the phrase "Not guilty", or the phrase "then the plaintiff cannot recover in this suit;" and (3) that because the declaration contained counts charging wilful and wanton negligence as well as counts charging ordinary negligence on the part of appellee the court erred in instructing the jury that the plaintiff could not recover in the absence of proof of ordinary care on his part.

There was conflict of testimony whether there was a bell ringing and a whistle sounding. Appellant and two of his witnesses testified that the whistle did not blow. Six witnesses introduced by him admitted they did not know whether the whistle was blown or not. Two other of his witnesses said that they did not hear it. Seventeen witnesses were introduced by appellee, who testified positively that the whistle was blown, and they heard it. Among these seventeen witnesses was a farmer's wife and a farmer's boy. There was testimony introduced tending to impeach the two witnesses other than appellant that testified positively the whistle did not blow. Apparently the greater weight of evidence was that the whistle did blow at the time and place in question. Appellant called seven witnesses to testify whether a bell was ringing. Four of them were not positive whether it rang or not. The same two witnesses that testified positively that the whistle did not blow also testified that the bell did not ring. Appellant himself testified that it did not ring. Ten witnesses for appellee testified positively that the bell did ring. Appellee's fireman and engineer said that there was an automatic bell on the engine which started ringing at Valonia and was not stopped until after they reached the crossing in question. Two mail clerks and the brakeman, and conductor of the train testified in corroboration of that fact. A farmer plowing in a field nearby and two other witnesses testified that they heard it ringing. We see no ground for contention that the special finding of the jury was not in accordance with the weight of the evidence.

The court gave the jury nine instructions tendered by the plaintiff, and thirty-four tendered by the defendant. It is not claimed that any of defendant's thirty-four instructions misstated the law or misapplied it to the facts except as claimed in

appellant's third point above mentioned, but it is argued that it was an excessive and unwarranted number of instructions that must have tended to confuse the jury. Eight instructions each concluded with the statement that if certain conclusions there stated were reached the verdict should be "not guilty", and several others with the statement that if the jury found certain facts "then the plaintiff cannot recover in this suit". Appellant well says it is error for the court to give a vast number of instructions amounting in the aggregate to a lengthy address by the court on behalf of the defendant. He cites several appellate cases in support of that proposition, and also *Donnelly v. Chicago City Ry. Co.*, 235 Ill. 35; and *West Chicago St. Ry. Co. v. Petters*, 196 Ill. 298. In none of the cases cited was the judgment reversed solely because of the excessive number of instructions. There might be reversible error in giving a large number of instructions with numerous repetitions of correct principles. But our attention is called to no Illinois case that has been reversed for that error alone. It is familiar doctrine that a trial court may be excused from giving a good instruction stating a correct principle of law that has been stated not so well in other instructions offered and given for the same party, and that inaccuracies in the statement of law and its application may be aggravated by repetition in the instructions and held reversible error partly because of the repetition. On the other hand, as said in *Chicago City Ry. Co. v. Sandusky*, 198 Ill. 400, there can be no hard and fast rule limiting the number of instructions. A number of concise, clear instructions each of which is confined to a distinct branch or phase of the contention, or a distinct proposition of law, is preferable to one

appellant's third point above mentioned, and it is argued that it was an excessive and unwarranted number of instructions that must have tended to confuse the jury. Right instructions each concluded with the statement that if certain conclusions there stated were reached the verdict should be "not guilty", and several others with the statement that if the jury found certain facts "then the plaintiff cannot recover in this suit." Appellant well says it is error for the court to give a vast number of instructions amounting in the aggregate to a lengthy address by the court on behalf of the defendant. He cites several appellate cases in support of that proposition, and also *Honnely v. Chicago City Ry. Co.*, 285 Ill. 80; and *West Chicago St. Ry. Co. v. Peters*, 196 Ill. 289. In none of the cases cited was the judgment reversed solely because of the excessive number of instructions. There might be reversible error in giving a large number of instructions with numerous repetitions of correct principles. But our attention is called to no Illinois case that has been reversed for that error alone. It is familiar doctrine that a trial court may be excused from giving a good instruction stating a correct principle of law that has been stated not so well in other instructions offered and given for the same party, and that inaccuracies in the statement of law and its application may be aggravated by repetition in the instructions and held reversible error partly because of the repetition. On the other hand, as said in *Chicago City Ry. Co. v. Stansbury*, 198 Ill. 400, there can be no law and fact rule limiting the number of instructions. A number of concise, clear instructions, each of which is confined to a distinct branch or phase of the question, or a distinct proposition of law, is preferable to one

long, diffuse and complicated instruction which includes within its range all or several of the propositions or phases of the case and attempts to advise the jury as to the different and independent alleged propositions. We regard the number of instructions given in the present case excessive. The trial court might properly have required appellee to reduce the number, and perhaps might have refused some of them because the same principle is substantially stated in others, but if each instruction is accurate and no other error occurred we do not think the judgment should be reversed for that reason.

The substantial answer to appellant's third contention that the jury were improperly required to find him in the exercise of ordinary care at the time in question is that while wilful, and wanton conduct of appellee was alleged in the declaration, there was no proof supporting it or tending to support it except appellant's attempt, which failed, to show that the statutory signals were not given on approaching the crossing. It was a through train, running without stops at Warren and other small stations, and the speed shown by the evidence cannot be said to be wilful and wanton negligence. The more technical answer is that appellant did not undertake to submit to the jury the question of wilful or wanton negligence, but in two or three of his general instructions covering the whole case told the jury that they could not find for the plaintiff unless they believed he was in the exercise of ordinary care for his own safety. He cannot complain that the court adopted that theory.

Appellee urges that the evidence failed to show due care on the part of appellant; that he was acquainted with the crossing, knew its dangers, and had he looked or listened he would have known

long, difficult and complicated instruction which included within its range all or several of the propositions or phases of the case and attempts to advise the jury as to the right and independent alleged propositions. It required the number of instructions given in the case and case massive. The trial court might properly have required specific to reduce the number, and perhaps might have required some of them because the same principle is substantially stated in others, but in each instruction is accurate and no other error occurred so do not think the jury should be reversed for that reason.

The defendant's theory is that the jury were improperly required to find him in the exercise of ordinary care at the time in question is that willful, and wanton conduct of applicant as alleged in the instruction, there was no proof supporting it or leading to suspect it except applicant's attempt, which failed, to show that the statutory signals were not given on approaching the crossing. It was a theory, train, running without stops at street and other small stations, and the speed shown by the evidence cannot be said to be willful and wanton negligence. The more liberal of course is that applicant did not in fact intend to admit to the jury the question of willful or wanton negligence, but in the exercise of his general instructions covering the will and told the jury that they could not find for the defendant unless they believed he was in the exercise of ordinary care for his own safety. The court adopted that theory.

Appellate argues that the evidence failed to show any care on the part of applicant; that he was contaminated with the crossing, knew its dangers, and had no lookout or listened no warning known

of the approaching train in time to warn the driver and avoided the accident. It is true that sufficient care on appellant's part might have thus avoided the collision; but he was not in control of the car; and whether at the time and place he was exercising the care of an ordinary prudent man under the same or like conditions we need not discuss or decide. We are of the opinion that the charges of defendant's negligence are not sustained by the evidence; therefore no ground of recovery is shown and the judgment should be affirmed.

Affirmed.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



6434

43418

R H Dan May 14/18
210 I.A. 494

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Frank Curley,

-vs-

210 I.A. 494

Appeal from circuit court,
Lake County.

City of Highwood, a
Municipal Corporation,
Appellee.

Willauna, J.

The appellee, Mr. Frank Curley, at the time of the commencement of this suit, was the owner of two acres of land adjacent to, and west of the city limits of the city of Highwood in Lake county, which ground he occupied as a home, with his family; and had resided there for about twelve years prior to the commencement of this suit. During the time mentioned the City of Highwood constructed a sewer to carry the sewage of the city, and as a part of this sewer constructed a catch basin or manhole, and near the home and premises of the appellee. The evidence shows that in times of heavy rain the covers of the manhole or catch basin would be forced off and the contents of the sewer, including sewage, human excrements, toilet paper and other offensive matter, would flow out and on to the premises of the appellee, and thus got into his well, and under his habitation, and created stagnant and ill smelling pools of water; that sometimes toilet paper and sewage would be spread over his lawn, and resulted in offensive odors, causing dampness in his house, deterioration of his furniture, and sickness in his family, and deprived him of the proper enjoyment of his home, as well as loss of crops and a number of physical discomforts. The appellee commenced suit in the circuit court of Lake County

484 .A.I.O.I.S

for the damage suffered by him. There was a trial by jury and a verdict in his favor fixing his damages at \$1000. The court required a remittitur of \$400. which was entered by appellee, and the motion for a new trial and in arrest of judgment made by the appellant were thereupon overruled, and a judgment rendered against the appellant for \$700. from which this appeal is prosecuted.

The appellant insists that while there is evidence to show that no crop was raised on appellee's premises during certain years and that there were foul odors and sickness in appellee's family, yet that the evidence was deficient in not showing the kind of crops that were in contemplation, or their value during those years, and that the evidence does not show the duration and extent of the foul odors, nor the nature or extent of the illness of the family, nor to what degree sickness was caused by the condition claimed; nor how many times the land overflowed; and that there is no evidence of the permanency of the injuries claimed. It is true that the evidence is somewhat deficient in the details of the pecuniary loss or damages suffered by the appellee, but it is sufficiently clear to show that appellee did sustain actual and substantial damages. The principal element of damage is clear and undoubted; namely, that the appellee suffered great physical discomfort, and was greatly injured in the enjoyment of his home, and that he was seriously deprived of the comforts which are usually incident to the home because of the condition of appellant's sewer. In that kind of a case no fixed rule for measuring damages can be defined, but the amount to be allowed is largely left to the ^{sound} ~~strict~~ judgment and discretion of a jury.

in view of the facts of each particular case. Chicago-Wirgin Coal Co., v. Wilson, 67 Ill.App. 448; Kemp v. Bassham, 60 Ill.App.85. It is clearly settled as a matter of law that a landowner may recover damages in consequence of the construction of a sewer where there is an outlet near his land where noxious substances flowed out of the sewer rendering the air unwholesome and offensive, where the plaintiff had been annoyed and injured. City of Jacksonville v. Lambert, 62 Ill. 520. To the same effect are Havins v. City of Peoria, 41 Ill. 502; City of Peoria v. Silletts, 30 Ill. 132; City of Aurora v. Reed, 57 Ill. 30; City of Jacksonville v. Doan, 145 Ill. 13.

As to whether some of the damages proven came within the averments of the declaration, we cannot pass upon because the appellant failed to set out the declaration in his abstract; and we must therefore assume that all the elements of injury proven came within the purview of the declaration. The appellant contends that there was error in the fact that no instruction was given informing the jury of the correct legal measure of damages; but the law does not require the plaintiff to offer any instructions to be given; his failure to offer an instruction with reference to the measure of damages cannot therefore be regarded as error. Appellant also urges objections to instructions 7, 8 and 9 given to the jury for the plaintiff. The point made with reference to instruction 7 cannot properly be considered without taking into account the averments of the declaration, and inasmuch as appellant has not set out the declaration in the abstract this matter is not before us for consideration. Instructions 8 and 9 are substantially correct statements of the law so far as they pertain to the evidence in the case. There was sufficient evidence upon which a jury

could estimate the damages resulting to appellee from the injuries proven. and we do not regard the amount of damages in the judgment excessive. The question raised concerning affidavits, which were filed in connection with the motion for new trial cannot properly be passed upon because the affidavits are not a part of the bill of exceptions, and have never been made a part thereof.

We find no reversible error in the case; and the judgment is affirmed.

Affirmed.

Gen. No. 6494

M. Frank Curley, appellee

vs

Appeal from Lake.

City of Highwood, appellant.

~~XXXXXXXXXX~~

Per Curiam:

On petition for rehearing it is shown that the affidavits on motion for new trial had been made part of the record by amendment to the bill of exceptions. We have examined said affidavits. There are two for defendant and two for plaintiff. They contradict each other, and there is no preponderance of proof that plaintiff did make improper statements to the jury when they visited the premises. Moreover this was before the hearing of testimony began. Defendant's officers had knowledge of the fact at the time. Defendant should have brought the supposed misconduct of the plaintiff to the attention of the court at once by a motion to discharge the jury or in some other manner. It could not wait till the jury returned an unfavorable verdict, and then for the first time complain.

The petition for rehearing is denied.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6495

41-2

210 I.A. 496

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6496.

Page 11.

Fred L. Stevens,

210 I.A. 496

-vs-

Ernest Lagerquist,

Appellee.

FACTS.

This case, as said in caption, was presented by the appellant, Fred L. Stevens, in the Circuit Court of Lincoln County against the appellee, Ernest Lagerquist, to recover upon a promissory note for the principal sum of \$1.00, alleged to have been made and delivered by the appellee to Donald Richards Co. for merchandise purchased by the appellee from said company and afterwards assigned to appellant, who claims to be a bona fide purchaser for value, and without notice of any legal defenses to said promissory note, or of any infirmity in the execution thereof. One of the defenses issued by the appellee was that his signature was obtained thereto by fraud and circumvention; appellee also claims that there was a failure of consideration, of which all the assignees of said note had notice; and that the appellant was not a bona fide purchaser. There was a trial by jury, which resulted in a verdict for the appellee, and judgment was entered upon the verdict barring the action on said note; from this judgment an appeal is presented. The evidence tends to show that the transaction from which the note resulted, an alleged sale to the appellee of a lot of perfumery and toilet articles, was fraudulent, and that the signature of appellee to the note was obtained by fraudulent means. According to the un-

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contradicted testimony of the appellee he was conducting a variety store in the summer of 1914 at Rockford, and a representative of Donald-Richards Co. called on him at his place of business in July of that year and asked him if he could send him some perfumery and toilet articles on a consignment basis; that he had two different lots which he wanted to send; the price of one lot being \$148.00 and of the other \$94.50; that when the proposition was first broached to him he did not look upon it with favor and declined to enter into it; but the agent called again on the same afternoon between five and six o'clock and at first purchased a couple of towels from appellee, then again broached the subject of sending him the goods referred to. He urged upon the appellee, in order to get him to accept the goods, that they were only placed on a consignment basis, and that he could sell all he could in ninety days and the rest could be returned; and he would have to pay only for what he sold. Whereupon the appellee finally consented to take the smaller lot of \$94.50 on that basis. The agent thereupon asked him to sign a paper, and informed the appellee of the contents of the paper, and read it over to him; that what he read of the paper was to the effect that the goods in question were to be consigned to the appellee for ninety days, and that he could return any of them that were left unsold, and pay for only what he had sold. The agent then asked appellee to sign the paper in two places, at the one place he told him was to be the signature to the consignment contract, and the other signature he represented was to show that the appellee was the owner of the store. It afterwards developed that one of the signatures of the appellee was attached

to the paper was to the note in question, and was at that time a part of the paper which the agent read over to him, but afterwards detached. The appellee was born and reared in Sweden, his principal education was in his native language. While he could read and write English, he could not do so readily, and he relied on the agent's reading of the paper and representations concerning the same as being accurate and true, and had no reason to doubt them. Nothing occurred during the course of the transaction, or at the time of signing of the paper, which contains considerable fine print, and was signed by the appellee in a somewhat dim light of the store, that would cause appellee to suspect that any advantage was being taken of him, either in the transaction itself, or in the signing of the paper in connection therewith. Fraud and circumvention in obtaining appellee's signature to the note in question was a complete defense to a recovery upon the note, unless the appellee was guilty of such negligence in executing the note and allowing it to go into circulation, as should preclude him from setting up the defense. Taylor v. Atchison, 54 Ill. 196; Luffier v. Smith, 57 Ill. 527; Richardson v. Schirtz, 59 Ill. 313; Munson v. Nichols, 62 Ill. 111; Sims v. Bice, 67 Ill. 88; Hubbard v. Rankin, 71 Ill. 129; Hewitt v. Jones, 72 Ill. 218; Sims v. Pyle, 84 Ill. 271; VanBrunt v. Singley, 85 Ill. 281; Monihan v. Coal Co., 193 Ill. App. 314. It is insisted by the appellant that in signing the note the appellee was guilty of negligence, and that therefore he is precluded from making the defense of fraud and circumvention legally effective; that he did not act as an ordinarily prudent person would have acted under the circumstances attending the obtaining of his signature. This was a question of fact for

the jury, and are of opinion that the jury were warranted
from the evidence to find that the accused was like
person of ordinary prudence, and was not guilty of the offense.
So find no reversible error in the record, and the judgment
is affirmed.

Thurs.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6505
210 I.A. 504

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918 the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

210 I.A. 504

Harry L. Peterson,

-vs-

Appel from circuit court
Whiteside County.

George Swartz, Daniel
Swartz, and Ethel Swartz,
Appellants.

Nichaus, J.

In this case the appellee, Harry L. Peterson, a judgment creditor, filed a creditor's bill against the appellants, George Swartz, Daniel Swartz and Ethel Swartz, in the circuit court of Whiteside county, praying for the discovery of property and assets of the judgment debtor, Daniel Swartz, for the purpose of applying the same to the payment of his judgment. It appears from the averments in the bill and the answers filed thereto, and the evidence heard by the chancellor, that the appellee recovered a judgment against Daniel Swartz in the circuit court of Whiteside county on February 12, 1914, in the sum of \$1482.20, and costs of suit; that an execution was issued upon said judgment to the sheriff of Whiteside county, and that thereafter the appellee filed a bill in equity in the circuit court of Lee county, alleging that Daniel Swartz had made a fraudulent transfer and conveyance of certain lands in Lee county to his son, George W. Swartz, and praying for the avoiding of the alleged fraudulent conveyance, and that it be removed out of the way of an execution to satisfy this judgment. A hearing was had on this bill, and the court found that the conveyance of the property, which was attacked by the allegations in the bill as fraudulent, was not fraudulent; and that therefore the appellee

was not entitled to the relief prayed for, and dismissed the bill for want of equity. Thereupon, on November 10, 1915, the appellee filed the creditor's bill, which is the basis of the proceedings here involved, and this bill is a creditor's bill seeking general equitable relief in the way of uncovering assets of the judgment debtor, which appellee avers he is entitled to reach and have applied in liquidation of his judgment. And the bill avers the recovery of the judgment, the issuance of an execution, the return of the execution nulla bona, and the inadequacy of the remedy at law. The bill requires the appellants to make answer under oath, which was done; and a replication was filed to the answers, and the chancellor heard the case upon the bill and sworn answers, the replication thereto, and the evidence adduced by the parties. The material averments of the bill are fully established, and it is not denied that at the time of the filing of the bill in question the appellant, George W. Swartz, was indebted to the judgment debtor, Daniel Swartz, for the full amount of the purchase price of \$12,800.00 for the Lee county land, the transfer and conveyance of which had been attacked in the previous bill of complaint; that the indebtedness was represented by seven promissory notes, all dated October 7, 1912, six notes being for the sum of \$1800. each, due and payable in three, four, five, six, seven and eight years after date respectively; and one note being due and payable nine years after date, all of said notes drawing interest at the rate of 5% per annum, and that two of said \$1800. notes, together with interest on all the notes, were due to the judgment debtor, Daniel Swartz, from the appellant, George Swartz;

that the total amount found to be due from Daniel Swartz to George W. Swartz was \$4388.00, and the court therefore adjudged and decreed that out of the moneys so found due from George to Daniel Swartz that the sum of \$1758.14 be paid by appellant, George Swartz, for the satisfaction of said judgment. An ~~appeal~~ appeal is prosecuted from this decree and it is contended that the decree rendered in the first proceeding to set aside the conveyance of the Lee county land and to remove it out of the way of the levy of an execution is a bar to this proceeding. And it is argued that the appellee, as judgment creditor, might have had the relief which he obtained in this case in the first proceeding, and that therefore the decree rendered in the first proceeding must be regarded as res adjudicata. We are unable to concur in this view of the case. The general rule concerning res adjudicata, as defined by our supreme court in the case of *Hanna v Read*, is as follows- "Whether the adjudication relied on as an estoppel goes to a single question, or all the questions involved in the cause, the fundamental principle upon which it is allowed in either case is, that justice and public policy alike demand that a matter whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties, where the same question or questions arise." *Hanna v. Read*, 102 Ill. 596. And in *Stone v. Salisbury*, 209 Ill. 56, the court makes this additional application of the rule stated as applied to the facts involved in that case- "As to the rule of res adjudicata here invoked, the property affected by the proceeding is different, and other property than that involved in the suit and proceeding

that the present state of the law is not satisfactory.

George, who is a member of the law firm, has been

and has been in the law firm for some time.

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relied upon; and it seems to be well established that before the rule has application in such a case it must appear that the identical question was in fact adjudicated in the former proceeding. The distinction seems to be that where the second suit is about the same matter or cause of action, then all matters that could have been, as well as all matters that actually were put in issue and determined in the former suit are presumed to have been put in issue, and as to them the rule applies; but when the second suit is to a different cause of action, or in reference to a different matter, or relating to different property, then the rule has no application except as to such matters as were actually in litigation and actually decided in the former proceedings relied upon as res adjudicata."

The former proceeding here referred to was different in character from the proceeding here involved, and the subject matter of the suit was different; the property affected thereby was different; the relief prayed was different, so that neither the cause of action, nor the property, nor the issues involved, nor relief sought, were the same; and under the averments of the bill in the former proceeding, while they were sufficient for the purposes of that case, the appellæ could not have obtained the general equitable relief, which is the object of the present bill. In a long line of decisions ~~at~~ our supreme court has carefully out lined the distinction between a proceeding in equity to set aside a fraudulent conveyance, out of the way of the levy of an execution, and a creditor's bill for the discovery of property or assets of a judgment debtor, to satisfy a judgment. And this distinction was again emphasized in the case of Rice Co. v. McJohn, 244 Ill. 264. The language there used is clearly applicable to the question here under consideration.

The court said- " This was a bill in aid of an execution, and was not, in its strict sense, a creditor's bill whereby the creditor seeks to satisfy his judgment out of some equitable estate, which is not liable to levy and sale under an execution at law. The only purpose of this bill was to remove a fraudulent conveyance out of the way of an execution. There is a clearly recognized distinction between the two classes of creditors' bills. Under a bill in aid of an execution the creditor may proceed as soon as he obtains judgment, and before execution has issued, while on the other hand, before he may proceed under a creditor's bill proper, he must exhaust his remedy at law by obtaining judgment, execution, and a return of the execution, nulla bona, or unsatisfied in whole or in part. Miller v. Davidson, 3 Gilm. 518; Dawson v. First Nat. Bk. 228, Ill. 577. The relief afforded by a bill in aid of an execution, is of a different character than that afforded by a creditor's bill. Under the former the only relief granted is to set aside the encumbrances or conveyances therein specified as fraudulent, while under the latter any equitable estate of the defendant may be reached." The court in the above case also emphasizes the proposition that no facts are properly in issue, unless charged in the bill, and no relief can be granted for matters not charged; and it is fundamental that a party must stand or xx fall by the case made out by his bill. Rowan v. Bowles, 21 Ill. 17; Helm v. Cantrell, 59 Ill. 524; Langlois v. People, 212 Ill. 75; Stearns v. Glos, 235 Ill. 390. It is clear from the averments in the prior bill and the decree rendered in the prior proceedings, that it was merely a proceeding to set aside and remove out of the way of an execution an alleged fraudulent conveyance attacked therein, and that this was the only issue, passed upon and adjudicated; and that under the averments in the prior bill the appellee could not have obtained any

equitable relief but that; and could not have obtained the relief he seeks in the case at bar. The fact that the appellee might have changed the character of his bill and the relief sought for, and by obtaining leave of court might have amended so as to make his bill one for general equitable relief, does not estop him. He had a right to pursue the remedy sought in the prior proceeding to the end, and then file another bill concerning a different matter, and seeking a different relief to justify his just demands. And the matters which appellee might have brought into the case for adjudication by way of amendment of his bill, do not make them adjudicated matters unless they were involved in the proper scope and purpose of his bill. It is apparent, therefore, that the principle of res adjudicata has no application to matters involved in this case, nor to the relief prayed for. The decree is affirmed.

affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6509

41745

210 I.A. 506

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6509.

page 54.

John Fischer, et al,
-vs-
Edward B. Haxtun, et al,
Appellees,
Appellants.

210 I.A. 506

Appeal from Circuit Court
Henry County.

Winn, J.

On or about March 31, 1906, the appellants, Edward B. Haxtun and Gertrude Haxtun, his wife, executed, acknowledged and delivered to the appellee, John Fischer, as trustee, a trust deed of certain real estate therein described then owned by the appellant, Edward B. Haxtun, to secure the money obtained on a loan from the Savings Bank of Kewanee. For this loan two promissory notes were executed, payable five years after date; one note was made for \$2000.00 with interest at the rate of 8% per annum, payable semi-annually; and the other note for \$700; with interest at the rate of 6% per annum. The notes were signed by Edward B. Haxtun, payable to the order of himself. The \$2000.00 note, which is the only one involved in this case, was immediately endorsed by the maker and transferred to his mother, Sarah A. Haxtun, who thereby became the legal holder thereof; and was the legal holder of this note at the time of her death, which occurred about May 1, 1913. Sarah A. Haxtun died testate in Boulder, Colorado, and George M. Strong, one of the appellees, was appointed executor of her last will and testament by the county court of Boulder county, Colorado. This suit was brought by John Fischer, as trustee of the trust deed referred to, and by George M. Strong as executor of the last will and testament of Sarah A. Haxtun, deceased, to enforce payment of the \$2000.00 promissory note mentioned, by foreclosing of the trust deed.

The appellants, Edward B. Haxtun and Gertrude Haxtun, his wife, defended against the proceeding to foreclose the trust deed on the ground that the maker of the note was not legally liable on the note. The case was referred to the master, who reported that the appellant Edward B. Haxtun was liable, and that the appellees were entitled to a foreclosure, and a decree was entered in the case in accordance with these findings; and from this decree an appeal is prosecuted.

The defense urged by the appellants is based upon the fact that Sarah A. Haxtun after the note in question was transferred to her and after she had become the legal holder thereof, wrote underneath the note in the blank space below the signature of the maker, the following words: "To be cancelled at my death, Sarah A. Haxtun". This writing was afterwards erased, and in the erased condition the note as part of the assets of Sarah A. Haxtun's estate, after her death, came into the possession of the executor. Appellants contend that by writing the words mentioned under the note, Mrs. Haxtun made a material alteration in the note and thereby destroyed its validity. It is obvious that the writing in question is in the nature of a memorandum by which Mrs. Haxtun attempted to record her wishes concerning the disposition of the note referred to after her death, and the memorandum was clearly not intended by Mrs. Haxtun to become a part of the note, and might as well have been written on another or separate piece of paper so far as its legal effect is concerned; nor was there any attempt to change the terms of the note thereby. A mere memorandum under a note by the holder of a note after its execution, not intended to change its terms does not amount to an alteration. It was so held in the case of Knowles v. Mill, 25 Ill. 338. In that case a recovery on a

The following is a summary of the evidence presented in the case of *United States v. [Name]*. The evidence is divided into two parts: the first part is the evidence in the case of *United States v. [Name]*, and the second part is the evidence in the case of *United States v. [Name]*. The evidence in the case of *United States v. [Name]* is as follows: [Name] was born on [Date] at [Place]. He is a [Nationality] and a [Religion]. He is a [Marital Status] and a [Occupation]. He is a [Residence] and a [Citizenship]. The evidence in the case of *United States v. [Name]* is as follows: [Name] was born on [Date] at [Place]. He is a [Nationality] and a [Religion]. He is a [Marital Status] and a [Occupation]. He is a [Residence] and a [Citizenship].

The evidence in the case of *United States v. [Name]* is as follows: [Name] was born on [Date] at [Place]. He is a [Nationality] and a [Religion]. He is a [Marital Status] and a [Occupation]. He is a [Residence] and a [Citizenship]. The evidence in the case of *United States v. [Name]* is as follows: [Name] was born on [Date] at [Place]. He is a [Nationality] and a [Religion]. He is a [Marital Status] and a [Occupation]. He is a [Residence] and a [Citizenship].

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The evidence in the case of *United States v. [Name]* is as follows: [Name] was born on [Date] at [Place]. He is a [Nationality] and a [Religion]. He is a [Marital Status] and a [Occupation]. He is a [Residence] and a [Citizenship]. The evidence in the case of *United States v. [Name]* is as follows: [Name] was born on [Date] at [Place]. He is a [Nationality] and a [Religion]. He is a [Marital Status] and a [Occupation]. He is a [Residence] and a [Citizenship].

note for \$1200.00 was contested because on the same paper that contained the note, which bore 10% interest, the payee and holder had written below the signature the following words, "When due to draw 15%," that this memorandum did not constitute an alteration of the note and could not be considered as a part of the note in the absence of proof that the memorandum was made at the time that the note was made and a part of the contract. The same point was decided in Carr v. Welch, Executor, 46 Ill. 88. It was claimed in that case that by writing in the right hand lower corner of the note there in question the words "10% after due" in red ink, (the note being payable in six months from date without interest) was an alteration of the note; but the court held that it could not be so regarded and that the manner in which the words were added to the note was wholly inconsistent with any hypothesis that they were placed there with any intent of making them a part of the note; that they were not incorporated in the body of the instrument, but apart from it, and the circumstance alone that the words were written in red ink of itself clearly indicated that they were not designed by the deceased holder to become a part of the note, but were merely a memorandum. The court in that case also emphasized the point that a memorandum may as properly be placed on the face as on the back of a note if done in such a mode as to deceive or injure no one, and show at a glance that no fraud could have been intended. We are of opinion, therefore, the writing in question was not intended to and did not become a part of the note itself, and did not change its terms, and that it did not constitute an alteration.

Aside from the controversy about the liability of the appellant Edward B. Haxton on the note referred to, certain questions

those for \$100.00. It was suggested that the note should be
contains the note, which have \$100.00 interest, and the note should be
not written after the signature of the person, which is
given \$100.00, that this memorandum is not sufficient to establish
of the note and series not as a interest and part of the note in the
distance of proof that the memorandum was made at the time that the
note was made and a part of the interest. The same thing was
decided in *Garret v. Walsh*, 10 Ill. 2d. It was claimed in
the case that by writing in the right hand lower corner of the note
there in question the words "I have paid in full" (the note
being payable in six months interest) was an
alteration of the note; but the court held that it was not an
alteration and that the amount in which the person was to be paid
the note was wholly immaterial with any implication that they were
placed there with any intent of making them a part of the note;
that they were not incorporated in the body of the instrument, but
separated from it, and the circumstances show that they were
written in red ink of itself clearly indicating that they were
designed by the decedent holder to become a part of the note, and
were really a memorandum. The court in this case was suggested
the point that a memorandum may be written on the back of the
note on the back of a note in form is not sufficient to make it a
part of the note, and that it is not sufficient to make it a part
of the note. We are of opinion that the writing in question
was not intended to be a part of the note, and that it was not
and did not change the terms of the note, and it did not make it a
alteration.

Since then the controversy about the liability of the
applicant to the holder on the note returned to, certain questions

are raised concerning the competency of witnesses, and the admissibility of evidence embraced in depositions. It is contended by the appellants that George L. Strong, who sues in his capacity as executor, was not competent to testify because he had an interest in the case in the way of commissioner as executor, and because his testimony was of benefit to certain heirs of Sarah A. Haxtun, deceased, and at the same time operated against the interest of the appellant Edward B. Haxtun as heir of said deceased. It is apparent, however, that this is not a suit against Edward B. Haxtun as heir of Sarah A. Haxtun, deceased, nor to enforce a liability arising from his relation to her as heir, but to enforce a personal liability to the estate, and the interest suggested would not therefore disqualify him as a witness. Moreover, he was called to testify only to the fact that the note in question was a part of the assets of the estate of the deceased testatrix, which he had received after her death as executor, and was in the same condition in which it appeared to him at the hearing. All of which were matters of fact that came to his knowledge after the death of Mrs. Haxtun. For the reasons above stated, Marie McPerson and Irie Fitzpatrick were also competent witnesses. A further objection is made by the appellants, however, to the testimony of the last named witnesses whose evidence was embodied in two depositions which were regularly taken and filed in the cause. It is contended that the master and the court had no legal right to consider these depositions because they were not formally offered as evidence before the master; and that the appellants had had no opportunity to object to the evidence in the depositions. Depositions when regularly taken, filed and opened, are a part of the record in a chancery case, and these depositions properly

appear as a part of the record in this case. A lack of opportunity to object was in no way harmful to the contention of the appellants and could not have availed the appellants anything because the witnesses, for the reasons heretofore stated, were competent; and they did not testify to anything that materially affected the controverted questions in the case. The appellants are therefore in no worse position than they could have been if their objections had been made a part of the record at the time the depositions were put in evidence. It is contended that the evidence of Edward B. Haxtun and Gertrude Haxtun which was ruled out by the master and the court should have been admitted and considered. These witnesses were clearly incompetent under section 2 of chapter 51 of the statute concerning evidence and depositions, which expressly provides that no party to any civil action, suit or proceeding, shall be allowed to testify therein of his own motion, or in his own behalf, when any adverse party sues or defends as the executor of any deceased person. It is also insisted by the appellants that because Edward B. Haxtun during the pendency of this suit conveyed the property embraced in the trust deed to his wife, Gertrude Haxtun; that the property involved, thereby became the separate property of the wife; and hence under section 5 of the act referred to, which has reference to the qualifications of husband and wife to testify for or against each other, both Edward B. Haxtun and Gertrude Haxtun became competent witnesses. It is sufficient to say concerning this contention that the objection to the competency of these witnesses was not made and did not rest on the ground that they were husband and wife, but because they were parties to the suit and directly interested in the event thereof, when the adverse party was suing them as executor of the

estate of the deceased person. The force of this objection was in no wise removed or changed by the conveyance of the property from the husband to the wife. The record does not disclose any error; the decree of foreclosure was proper and is affirmed.

Affirmed.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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210 I.A. 508

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on .

APR 9 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Alonso B. Murray, Appellee,
-vs-

Meadows Manufacturing
Company, a corporation,
Appellant.

210 I.A. 508
Appeal from Circuit Court
Livingston county.

Nichaus, J.

Alonso B. Murray, the appellee, while in the employ of appellant, the Meadows Manufacturing Company, in the course of his employment fell down an elevator shaft a distance of about thirteen feet, suffering severe injuries from the shock, wounds, and bruises resulting therefrom. The accident occurred on April 8, 1913. On September 15, 1913, the appellee proceeded under the Compensation Act of 1911, under which he had been working, to recover compensation for his injuries, and filed a petition for the appointment of arbitrators in the county court of Livingston county. Afterwards, however, on October 1, 1913, he commenced in the circuit court of Livingston county an action on the case, claiming that his employer was liable to him under section 3 of the Compensation Act of 1911, on account of an intentional omission to comply with the statutory safety regulations. And this suit proceeded to a trial; but before its conclusion the appellee took a non suit by which it was ended without final judgment. He thereupon resumed the prosecution of his claim under the Compensation Act in the county court, by making a motion to re-instate the cause for further proceedings therein- the case having been stricken from the docket in the meantime with leave to re-instate- and the case was re-instated, and arbitrators appointed,

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who made a finding to the effect that the appellee and the appellant were operating under the Workmen's Compensation act of 1911, and had elected to accept the provisions thereof, and that the appellee had sustained accidental injuries in the course of his employment; that his wages were twenty cents per hour and ten hours per day; that he had been temporarily permanently disabled from following his usual occupation and employment for a period of 62½ weeks, beginning with the 8th day of his disability; that he was entitled to receive and recover from the appellant, his employer, \$6.00 per week for the 62½ weeks mentioned, amounting to \$375., and that he was entitled to receive also \$25. for first aid medical, surgical and hospital treatment. The appellee appealed from this finding of the arbitrators to the circuit court of Livingston county where a trial de novo was had by a jury, and the jury returned a verdict finding that the appellee was entitled to payment for medical services in the sum of \$100; also finding that he was entitled to compensation for temporary and total disability, and partial permanent disability, and fixed the compensation for temporary total disability at \$6.00 per week for a period of fifty two weeks, beginning on April 16, 1913; and fixed the compensation for partial permanent disability at \$4.50 per week, beginning on the 15th day of April, 1914, for a period of 364 weeks. The appellant thereupon made a motion for a new trial, and in arrest of judgment, which were overruled, and the court entered judgment on the verdict, from which judgment this appeal is prosecuted.

The first point urged for the reversal of the judgment is that there is no evidence in the record tending to show what earnings, if any, the plaintiff made, or was capable of making

after the accident, and therefore no evidence upon which to base the compensation which appellee was entitled to for partial permanent disability. In support of this contention appellant cites the case of *Carlson v. Avery Mfg. Co.*, decided by this court in 196 Ill. App. 306. The Carlson case, however, is not applicable to the situation presented by the present case. The decision in the Carlson case had reference to conditions arising under the findings of a special verdict. In this case no special verdict was rendered, but a general verdict under the issues presented; the presumptions arising with reference to a special verdict are entirely different from those arising under a general verdict. Moreover, in this case there was evidence tending to show that the appellee was able to work part of the time at employment similar to that in which he was engaged before the accident; and evidence to show that he was able to work parts of a day at other different employments. From the evidence on this point taken in connection with the evidence of his earning capacity before the accident, the jury were able to, and were fully warranted in making the estimate of the compensation to which appellee was entitled for the partial permanent disability. It is not necessary that the evidence to sustain a general verdict should be so clear and complete in a case of this kind, that the amount of compensation could be figured therefrom with mathematical accuracy.

The appellant also complains because the trial court admitted evidence that appellee had little or no education. We are of opinion that this evidence was admissible on the question of what limitations there were on appellee's earning capacity after the accident and injury. *Graham v. Mattoon City*, 177 Ill. 403; *District of Columbia v. Woodbury*, 136 U.S. 450; *Butcher v. On*

Damages 1248.

It is also contended by the appellant that the trial court :
erred in allowing the physician who attended the appellee during
the time he was suffering from the injuries he had sustained by
the fall down the elevator shaft to testify that nephritis and
heart dilation resulted from the injuries which appellee received
by the accident. In this case there was no dispute as to the man-
ner and cause of the injury, and no dispute that there was an
injury sustained. Under the rule repeatedly held by the supreme
court it was therefore competent for a physician to testify
directly that a later malady was caused by the accident or original
injury, upon the same ~~principal~~ principle that it would have been
competent for him to have testified that death resulted from a
certain injury. *Kimbrough v. Chicago City Ry. Co.*, 273 Ill. 71;
Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154; *City*
of Chicago v. Didier, 227 Ill. 571.

Appellant also complains of the giving of the 6th in-
struction for appellee in which the jury were told that if they
found that the appellee had little or no education, and by reason
thereof was limited in his ability to find employment, or engage
in pursuits requiring educational qualification, that they would
have a right to consider this matter in connection with his phy-
sical injuries in considering their verdict as to the amount which
should be given the appellee. The language of the instruction
is perhaps not as clear as it should have been to attract the
attention of the jury to the particular feature of the case in which
the lack of education of appellee should be considered; but the
instruction does not direct a verdict, and appellant is not in

position to raise any question concerning the defect in the wording of the instruction because it has not set out its own instructions in the abstract; under those circumstances we must assume that there may have been an instruction among those not set out which cured the error, which at any rate was not of such a serious character as to make it reversible.

Appellant also contends that by bringing the action in the circuit court after appellee had instituted proceedings as claimant under the Workmen's Compensation act, he was estopped in his right to recover compensation under the Compensation act under the doctrine of election of remedies. If the appellee made an election of remedies it was made when he instituted the proceedings under the Compensation act; and it might be that such an election was a bar to the circuit court proceeding; but the second proceeding which he commenced after the election had been made and which was not prosecuted to a final judgment, but dismissed, cannot be regarded as barring the appellee from prosecuting to a final conclusion the proceedings first commenced. It was expressly held in *Flower v. Brumbach* that "The circumstance of a party having elected one of several remedies by action will not in general preclude him from abandoning such suit; and after having duly discontinued it, he may adopt any other remedy." *Flower v. Brumbach*, 131 Ill. 646. And to the same effect are *Stier v. Hirms*, 154 Ill. 476; *Barchard v. Cohn*, 157 Ill. 597; *Gibbs v. Jones*, 46 Ill. 318; *Johnson-Brinkman Commission Co., v. Missouri Pacific R. Co.*, 126 Mo. 344.

We are of opinion therefore, that after the non suit was entered in the circuit court proceedings, the appellee was not estopped to prosecute to a conclusion the proceedings already

continued under the Compensation Act. The records have not
disclose any reversible error, and the judgment is therefore
affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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R H Owen May 14/18

210 I.A. 510

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Frank Johnson, et al.,
members of the Cornell
Improvement Association,
Appellants,

-vs-

George Whitham,
Appellee.

210 I.A. 510

Appeal from circuit court
Livingston county.

Nichaus, J.

Frank Johnson and twelve other parties complainant filed a bill of review against George Whitham, the appellee, and later filed an amended bill of review, to which the trial court sustained a demurrer interposed by the appellee who was the sole defendant. All of the complainants in this bill of review except F. C. Gusik prayed an appeal to this court; and an appeal bond was filed and approved. The appeal bond recited an appeal by thirteen complainants, and was executed by them. A motion was then made in the court below to strike such appeal bond from the files because no one had signed it as surety, and for other alleged defects, but the record does not disclose what, if anything, was done with that motion. The complainants thereupon obtained additional time in which to file another appeal bond, and filed an appeal bond, which was executed by thirteen, but to which said Gusik was not a party. This last bond was duly approved, and we assume the appeal is here by virtue of the last bond. It may be that the appeal should be dismissed because of the failure of one of the thirteen parties to whom the appeal was allowed to join in the execution of the appeal bond, but we pass this question inasmuch as it is not relied upon by the appellee.

The bill of review in question is somewhat informal. After a proper commencement, but without any explanation or allegation of fact, the entire record of the former chancery case is inserted beginning with the original bill, and ending with the final decree. The original bill was filed by George Whitman, appellee herein, against some 49 defendants, who with Whitman were alleged to have formed a partnership for the erection of a certain building; and it alleged that Whitman erected the building for said partnership upon an agreement to pay him the cost of its construction, and 6% interest thereon.

The bill averred that Whitman had constructed the building and that the co-partnership owed him a certain sum, and that they also owed a certain other amount in connection with the construction of said building. The bill sets out the number of shares which each member of the partnership owned, and prayed a dissolution of the partnership, and that an account be taken, and that the defendants be required to pay him what should appear to be due him upon the accounting, and the complainant offered to pay anything which might be due from him upon such accounting, and asked for other relief. The record discloses that after the partnership was entered into and the building constructed, the partners attempted to convert the partnership into a corporation, which would own the building constructed by appellee. But ^{by} ~~the~~ later proceedings the building and property of this corporation was sold, and there was a deficiency decree against thirty-one of the partners, including the appellants herein, for the balance due the complainant, Whitman. Thereafter this bill of review here involved was filed on the ground that there were certain errors apparent in the former

proceedings. The bill was filed by only thirteen of the many defendants in the original bill, and was only against George Whitham, the appellee, thus entirely omitting from this bill of review the great majority of the persons who had been found to be partners by former decrees; also omitting nineteen persons who had been ordered and decreed jointly with the complainants in this bill to pay the final sum found due to appellee.

A bill of review is properly filed to procure an examination and reversal of a decree after its enrollment, and is not a part of the original cause, but an independent proceeding, and is the only proper method by which the court rendering a decree can review it for error after the time for rehearing has expired. Judge Storey in his work on Equity Pleading states the general rule concerning the parties to a bill of review to be that all the parties to the original bill ought to be made parties to a bill of review; that it is a principle of natural justice that no one ought to be affected by any decree without his first being heard. 2 Story's Equity Pleading (10th Ed.) 392.

The want of proper parties to a bill is a good defense, in equity, at least, until the new parties are made, or a proper reason is shown why they are not made. The great object of courts of equity is to put an end to litigation and to settle, if possible, in a single suit, the rights of all parties interested or affected by the subject matter in controversy, hence the general rule that all persons are to be made parties who are either legally or equitably interested in the subject matter and result of the suit, however numerous they may be. 2 Story's Eq.Jr.(10th Ed.) 784. (Sec.1526.)

It is a fundamental principle in equity concerning parties, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit; and it is not ordinarily a matter of substantial importance whether they are joined as plaintiffs or as defendants. The primary object is that all persons sufficiently interested may be before the court so that the relief may be properly adjusted among those entitled thereto, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be fixed, and that all may be bound in respect thereto by the single decree. 1 Pomeroy's Eq. Jur. (3rd. Ed.) Sec. 114; 16 Cyc. 520; Concannon v. Noble, 96 Ind. 326; Lester v. Mathews, 58 Ga. 403; Amiss v. McGinnis, 12 W. Va. 295; Bank of U.S. v. White, 8 Peters, 262. In our own state the courts of review have emphasized the same rule.

In the early case of Turner v. Berry, 3 Ill. 541, our supreme court held that as a bill of review the bill filed in that case was fatally and substantially defective because all of the parties to the original decree, and whose interests are affected by the original decree, were not made parties to the bill, and that all whose interests are affected by a decree should be made parties to a bill of review to reverse it.

To the same effect is Ropiequet et al v. Knebelkamp, 194 Ill. App. 200.

A lack of proper parties is so vital in a chancery proceeding that though such lack of parties is not set up in the proceeding, the court itself will take notice of such omission and refuse to proceed. *Marcy v. Marcy*, 200 Ill. App. 276.

In some jurisdictions this rule has been modified to the extent of requiring that only the necessary parties interested in the decree be brought into court; that is to say, that if some person had been made a party who, as it afterwards appeared had no interest in the litigation, it would not be necessary to have him as a party to a bill of review; but the modification cuts no figure in the present case, because here nineteen persons were decreed jointly, with the twelve appellants, to pay the appellee the money still due him, and these nineteen are omitted as parties, and this point was specially made in appellee's demurrer.

Appellants contend that one of the errors apparent in the original proceeding is that one or two of the parties who were ordered to pay under the original decree, were not served with process, and one or two had died. This question has been passed upon adversely to appellant's contention in *Henrichson v. VanWinkle*, 21 Ill. 274, and *Horner v. Zimmerman*, 45 Ill. 14, where it was held that this error is personal to the parties not served and that it does not concern the other parties. and it has been repeatedly held that a party cannot assign for error that which does not affect him but is prejudicial only to others who do not complain. *Press v. Woodley*, 160 Ill. 437; *Hesing v. Attorney General*, 104 Ill. 232; *Henrichson v. VanWinkle*, 21 Ill. 274; *Horner v. Zimmerman*, 45 Ill. 14; *City of Chicago v. Cameron*, 120 Ill. 447; *Richards v. Green*, 78 Ill. 525; *Greenman v. Harvey*, 50 Ill. 386;

Robinson v. Brown, 82 Id. 279; Willemis v. Dunn, 93 Id. 511; Grand Tower etc Co. v. Cady, 96 Id. 430; Ransom v. Henderson, 114 Id. 528; Lagger v. Mutual Union Loan & Building Assn., 146 Id. 283.

Appellants also insist that the original bill only contemplated the sale of the property to any Whitham, but this is a misapprehension. The original bill did not ask to have the property sold as Whitham had no lien thereon, but sought to compel payment by the members of the partnership to him as a personal liability, and the bringing in of the property and its sale was an after consideration. It is also claimed that the record shows that the bill, after the sale of the property, was stricken from the docket with leave to re-instate, and then re-instated without any showing of notice to the appellants; but it does not appear that they raised this question in the trial court nor that their interests were jeopardized in any way, nor that any inequity or injustice was done them thereby; hence they are not in position to effectively raise this question on appeal.

It is also pointed out that the court overruled the demurrer as to the defendant Cusik, and entered some kind of a decree in his favor. This perhaps was improperly done, but Cusik is not one of the appealing parties now before the court, and the other twelve complainants who perfected the second appeal bond cannot complain of something which was improperly favorable to Cusik but did not injure them, and the appellee has not filed any cross errors to raise any question concerning the improper finding as to said Cusik.

We find no reversible error in the decree sustaining the demurrer and dismissing the bill, and it is therefore affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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Rt Hon May 9/18

Ne J

210 I.A. 511

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6580.

Record 21.

210 I.A. 511

John Looney,

-vs-

Appeal from county court,
Rock Island County.

Chicago, Rock Island
and Pacific Railway

Company,

Appellee.

Nichols, J.

John Looney, the appellant, in the fall of 1911, bought 38 small horses, which had been raised on the Sacralia Indian Reservation in New Mexico, and transported them from Monero, New Mexico, to Milan, Rock Island County, in this state. The horses were first transported from Monero to Pueblo, Colorado, a distance of about two hundred miles, on the Denver & Rio Grande Railroad, and at Pueblo, Colorado, they were transferred to appellant's railroad and transported to the place of destination, a distance of about 1000 miles. Appellee testified that the agent of appellant's company at Pueblo had assured him that the train on which the horses were to be shipped was a fast train which would go through without stops, but the train on which the horses were shipped from Pueblo to Milan was a slow train, which stopped and switched very much, and that his horses were very harshly treated during the entire journey. Appellee rode on the same train with the horses and made numerous complaints concerning the treatment which the horses were receiving; also sent a number of telegrams to officers of the company asking for relief, and at two points on the road appellant sent a veterinary to examine the horses. The proof tends to show that the car containing appellee's horses was so roughly handled by appellant's

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employees that one of the horses died on the road, and others died after reaching Milan, and some were seriously injured. This suit was brought to recover damages which resulted to him in consequence. Appellant's counsel contend that it is improbable that so many different freight crews could have handled these horses in the same improper manner. Appellee's testimony however, was not contradicted, and it is a sufficient answer to appellant's contention to say that if there was any means of disproving appellee's claim of the mistreatment of his horses it was in the hands of the appellant; and no attempt was made to contradict the proof on this point. The principal ground argued for reversal of the judgment, however, concerns the sufficiency of proof of the measure of damages. Appellee introduced evidence on the trial of the market value of horses like those here involved at Milan, and of the value of the horses in the damaged condition in which the shipment was received at Milan. It is contended by appellant that proof should have been made of the intrinsic value of the horses, and that the court erred in not permitting appellant on cross examination to ascertain from appellee what he paid for the horses at the Jacarilla Indian Reservation. Proof of what appellee paid for the horses was not competent evidence, and was properly ruled out. *Pleff v. Pacific Express Co.*, 351 P.2. 248. And we are of opinion that the record contains competent proof of the market value. Appellee himself testified to the market value of the horses at Milan at first, perhaps, without a sufficient foundation having been laid, but afterwards a proper foundation was laid for his testimony on that point. Then two other witnesses testified to the market value, and from their testimony it is apparent that

they were men who had dealt in horses and who had knowledge of market value of horses of the kind, nature and disposition of appellee's horses, and this testimony was adduced without objection. Appellant sought to discredit these witnesses on cross examination, by showing that they were not particularly acquainted with horses raised on the Jicarilla Reservation, and it now urges that it should have appeared as part of their qualifications as witnesses that they were acquainted with the market value of horses raised on the Jicarilla Reservation. However, there is nothing in the record to indicate that horses raised on the Jicarilla Reservation have a different market value from horses raised on other reservations in New Mexico, or the west. These witnesses testified that they had knowledge of the market value at Milan of Western horses of the character, quality and disposition of the horses of appellant prior to, as well as since, 1911. We are of opinion that the foundation thus laid for the testimony of these witnesses concerning market value was sufficient, and that by their testimony a prima facie case was made out on that question. *U.S. R.R. v. Bailey*, 100 Mo. 242, 174 Ill. 14; *U.S. v. St. L. Ry. Co.*, v. Patten, 201 Ill. 373; *Webash Ry. Co.*, v. Campbell, 219 Ill. 320. The prima facie case made out, was not disproved. The record does not disclose any reversible error, and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6522

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R H Orr May 14/18

210 I.A. 513

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Richard Hansen, Appellant,

-vs-

Peter J. Muldoon, as
Catholic Bishop of
Rockford, and
Harry E. Quinn,
Appellees.

210 I.A. 513

Appeal from circuit court,
McHenry County.Nichaus, J.

The appellant, Richard Hansen, filed a bill in chancery in the circuit court of McHenry county to establish a mechanic's lien as sub-contractor against the appellees, Peter J. Muldoon, as Catholic Bishop of Rockford, and Harry E. Quinn, a contractor. The bill alleges that on or about the 7th day of August 1913, the appellee, Peter J. Muldoon, as Catholic Bishop of Rockford, was the owner of certain premises described in the bill, situated in McHenry county, and that he entered into a written contract with Harry E. Quinn, a contractor, for the erection of a church building on said premises for the sum of \$13915.00; and that on the 10th day of August 1913, said contractor entered into a verbal contract with the appellant, a mason contractor, by which the appellant agreed to furnish said Quinn certain material and necessary labor, and mason work to construct said church building; and that in pursuance of said agreement said Quinn on the 21st day of August entered into a bond with appellant in the penal sum of \$2000.00, which bond recites the fact that the appellant had agreed with said Quinn to furnish labor as directed by said Quinn in the construction of said church building; and that said Quinn agreed to pay the appellant certain sums as the work pro-

FILE A.1012

J. RICHARDS

- 24 -

gressed; and also to pay appellant for his services the sum of \$35.00 per week; and also to pay him the further sum of \$250.00 upon the completion of said building, said bond being conditioned to make the payments therein provided; that on November 8, 1913, an addition was made to said bond, whereby said Quinn agreed to pay the appellant \$500.00 for his services instead of \$250.00, as therein provided. The bill also alleges that the appellant furnished the contractor, Quinn, labor, material and mason work, which were used in the construction and erection of the improvements on the premises between August 14, 1913, and December 19, 1913, amounting to the sum of \$3935.50; said sum being the usual, customary and reasonable price for similar work under similar conditions and circumstances; that on the 27th day of December, 1913, petitioner caused to be served upon the appellees, Peter J. Muldoon, as Catholic Bishop of Rockford, and owner of the premises, and also upon Rev. Thomas Kearney, his duly authorized agent, and upon William Gubbins, the architect in charge of said work, by delivery to each of them, a notice for a mechanic's lien, which notice is set up in the bill, and recites the fact the appellant had been employed under a verbal contract with Harry M. Quinn, contractor, to furnish the labor for the construction and erection of the building known as St. Patrick's Church in Hartland Township, Henry County, of which said Harry M. Quinn was contractor, having a written contract with said Peter J. Muldoon, the owner, as Catholic Bishop of Rockford, for the construction of said church building on the premises described; and that there was due the appellant for labor so furnished under said contract with Quinn the sum of \$3719.31; and that there was also to become due to said appellant for labor

furnished the further sum of \$3000.00 when said building was completed; and that appellant claimed a lien upon the premises described, and also upon any moneys then due or to become due to said Quinn by virtue of his contract with said appellee. The bill also alleges that at the time of the service of said notice there was due and unpaid to the said Harry M. Quinn from said Peter J. Muldoon, on said contract with Quinn a large sum of money, to-wit: at least the sum of \$3000.00; and that on January 12th the appellant caused to be filed in the office of the circuit clerk of Henry county, a statement of his claim for lien, which is set out in the bill, and that appellant has refused to carry out and complete his contract with said Quinn for the reason that said Quinn had abandoned and refused to complete said improvements, or to carry out the terms of his written contract with said Peter J. Muldoon; and that said Quinn at various times and places has refused and then still refused to pay appellant the money due him for labor and material, and mason work furnished by him in the construction and erection of said improvement; and for the further reason that said Quinn on the 16th day of December 1913, ordered and requested that the appellant and the men whom appellant had employed, cease work upon said building, and the construction and erection thereof; and that appellant has complied with the orders and requests of said Quinn on said date and ceased work on said building, and had furnished no work or material of any kind since that time. An amendment was subsequently made to the bill concerning the contract between Peter J. Muldoon as Catholic Bishop of Rockford, and Harry M. Quinn, contractor, to the effect that Quinn by said contract had agreed to complete said church

building by December 10, 1915, and that said Peter J. Mulcaon, as Bishop, by the terms of said written contract, had agreed to pay the sum mentioned therein upon the completion of said contract, at the time mentioned; and that the appellant, by accepting the bond referred to hereinbefore, did not agree to waive any lien. A joint and several answer was filed to the foregoing bill of appellant, by the appellees, which answer admits that Peter J. Mulcaon, as Catholic Bishop of Rockford, was and is the owner of the premises described in the bill and admits that as Catholic Bishop of Rockford, he entered into a written contract with Quinn for the erection and construction of a new church building upon the premises described; and that by the terms of this contract the owner agreed to pay Quinn as contractor the sum of \$18915.00, the said sum to be in full payment to said Quinn for the construction and erection of said church building. The answer denies that the contractor, Quinn, entered into a verbal contract with the appellant for the labor and mason work to construct said church building, and denies that he entered into the bond with appellant set forth in the bill; and denies that the appellant furnished to Quinn labor, material and mason work to the amount of \$3985.50; and denies that the labor and mason work alleged to have been furnished to Quinn were used in the construction and erection of the improvement on said premises; and denies that the labor, material and mason work was furnished at the usual, customary and reasonable price for similar work; and denies that there was due to appellant from Quinn the sum stated in the bill; also denies service of the notice of mechanic's lien, as set forth in the bill. The answer admits

that the appellant caused a claim or lien to be filed in the office of the circuit clerk, as set forth in the bill, but denies any conversations of appellant with Rev. Thomas Kearney or William Gublines in regard to obtaining money for labor and material, and denies that said Kearney and Gublines requested appellant to continue furnishing labor and material, or that they said they would see that appellant secured the money due to him, as alleged in the bill. The answer also denies that the appellant was a sub-contractor; and avers that he entered into an agreement with the appellee, Quinn, whereby he was to work for said Quinn as his foreman at a salary of \$35.00 per week; and that it was further agreed between them, that the appellant in consideration of the sum of \$300.00 was to procure the money to pay the masonry for said Quinn; and that the money so procured was to be considered a loan to said Quinn; and that any work or labor performed by the appellant on the building in question was performed as foreman for said Quinn, and not as sub-contractor; and that any and all labor in the construction of said building was furnished by said Quinn; that no person or persons other than said Quinn and his employes, furnished any work, labor or material used in the construction of said building. A replication was filed to the answer, and the cause was referred to a special master, who heard the evidence and reported his findings to the court.

The master found the facts substantially as set up in the bill; and that there was due to the appellant, from the contractor Quinn, the sum of \$950.31; and that as sub-contractor the appellant was entitled to a lien upon all the real estate and improvements described in the bill for the amount stated;

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exceptions were filed by the appellees to the master's findings, some of which the court sustained, and thereupon a decree was entered dismissing the bill for want of equity; and from this decree appellant prosecutes an appeal.

The question raised on the record broadly stated is whether or not the appellant under the averments of his bill, the answers filed thereto, and the proof in the case, is entitled to a lien against the premises in question, under the Mechanic's Lien act. And to determine this question on its merits the court will look into the whole record presented. *Belouse v. Slaughter*, 241 Ill. 215. Under the averments of the bill it is manifest that the lien involved is claimed by the appellant in consequence of the default of the contractor Quinn, and not because of any default or failure on the part of the owner of the premises. The bill alleges that the contractor Quinn abandoned his contract, and refused to carry it to completion. Appellant claims that there is some evidence in the record to the effect that Quinn "finished the job"; there is no evidence, however, that Quinn carried out his contract. And the evidence of the contractor, Quinn, that he "finished the job" does not necessarily conflict with the averments in the bill that Quinn abandoned his contract and failed to carry it out, because the reasonable inference is that, if he finished the building after he abandoning his contract, he must have done so under some other and subsequent arrangement with the owner, which would not be out of the usual order and custom in that kind of an emergency; and furthermore, would be entirely within the legal rights of the owner in order to secure the completion of the building; in that case, the owner would have the right to use any money that remained in his hands,

which would have been due and payable to the contractor had he completed his contract for the purpose of finishing the job; and a sub-contractor would only acquire a lien to reach the balance that might remain in the hands of the owner after paying what was necessary to expend in completing the job according to the contract. Where the original contractor abandons his contract and fails to carry it out, it is necessary to prove that the owner was indebted to the original contractor, under the contract, before a lien can be enforced against the owner for the benefit of a sub-contractor. *Voight v. Guarantee Construction Co.*, 190 Ill. App. 129. There is no evidence in the record that any money was due the contractor or that any balance remained in the hands of the owner under the conditions mentioned. It is true that the evidence shows a payment of \$5000.00 was made by the owner on account of the construction of the building in question, after the original contract had been abandoned; but the evidence does not show that such payment was made to Quinn as original contractor; nor that it was a payment under the contract, but the evidence is that it was made jointly to Quinn and a bonding company by check; and that the payment was by Quinn immediately turned over to the bonding company. No legitimate inference can be drawn from this evidence to the effect that this was a payment for any indebtedness under the original contract. It is clear therefore, that the allegation in the bill which avers that at the time of the service of the notice there was money due the contractor Quinn from the owner, which was necessary as a legal basis for appellant's claim of lien, is not sustained by the proof. The averment of the bill with relation to the case makes it unnecessary to discuss or decide the other controversies,

urged at length in the briefs of the respective parties.

We are of opinion that the appellant was not entitled to a lien as sub-contractor; and the decree dismissing his bill was proper and is affirmed.

Affirmed.

Gen. No. 6523

Richard Hansen, appellant

vs

Appeal from McHenry

Peter J. Muldoon &c. appellees

Per Curiam:

On a petition for a rehearing appellant argues that in our foregoing opinion we overlooked the fact that the Bishop made a payment to the contractor of between \$1900 and \$2000 without requiring the statutory statement from the contractor, and that appellant was entitled to a lien for at least that amount because such payment was improperly made. We omitted to discuss that fact because appellant's bill of complaint did not place his right to alien upon any such ground. Appellant could only have relief upon the grounds stated in his pleadings. The petition for a rehearing is denied.

Gen. W. G. 6828

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On a petition for a writ of habeas corpus, return made

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STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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210 LA 515

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 9 1918 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:



J. Tremarico and
Jasper Carle,
Appellees,

210 I.A. 515

-vs-

Appeal from circuit court
Stephenson County.

Illinois Northern
Utilities Company,
a corporation,
Appellant.

Michaud, J.

This is an action on the case brought by the appellees, J. Tremarico and Jasper Carle, in the circuit court of Stephenson county against the Illinois Northern Utilities Company, appellant, claiming damages resulting from a collision of appellant's inter-urban car with a horse and milk wagon owned by the appellees. The collision occurred on the 29th day of September, 1916, in the city of Freeport at the intersection of Stephenson and West streets. It is alleged in the first count of the declaration that the appellant is an Illinois corporation, operating an electric street railway in the streets of Freeport, and on and along Stephenson street at its intersection with West street; and that on the day in question while the appellee Carle was driving a horse and milk wagon with all due care and caution at said intersection of West and Stephenson streets, that the appellant by its servants so negligently, carelessly and improperly drove and managed the street car that it ran into and struck appellee's milk wagon and horse with great force, so that the wagon was crushed and the horse attached thereto wounded. The negligence alleged in the second count of the declaration is that the appellant failed and neglected to ring a gong fifty feet before the car in question approached

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the intersection of West and Stephenson streets, as required by the city ordinance of the city of Freeport, and that it was in consequence of this negligence that appellees' milk wagon and horse was struck. The evidence shows that the street car line which appellant operates in the city of Freeport runs east and west along Stephenson street, and that West street cross^{es} Stephenson street at right angles running north and south; that the appellees were in the milk delivery business, and on the day in question the appellee, Carle, while engaged in this business, was driving a horse attached to a milk wagon along West street going north across Stephenson street, and that just before he got to the street car tracks he stopped his wagon momentarily, apparently to look out for the street cars that might be approaching, but that he immediately after that whipped up the horse and started rapidly across the tracks and had nearly cleared the tracks when the street car in question, which had approached from the west, struck the rear end of the wagon. The result of the collision was that the rear end of the milk wagon and a number of bottles containing milk and cream were broken, and some butter was spoiled. The horse was knocked off of its feet and injured, so that it could not be used for several weeks. There was a trial by jury, which resulted in a verdict for \$110.14. Appellant made a motion for a new trial, and in arrest of judgment, which motions were overruled by the court; and a judgment was rendered upon the verdict against the appellant. From this judgment an appeal is prosecuted.

The principal point urged on appeal is that the verdict is manifestly against the weight of the evidence and that the judgment should therefore be reversed. The first count of the declaration was expressly abandoned during the trial, the only

basis for a recovery is the allegation of failure to ring the gong as the street car in question approached the crossing where the collision occurred. It is necessary only therefore to consider the evidence with reference to the latter charge. The appellee, Carle, testified that when he stopped his wagon just before crossing the tracks he looked and saw no car approaching, and heard no gong, and he is the only witness for the appellees whose attention was directed to the matter of the ringing of the gong who testifies that the gong was not ringing. There were two other witnesses, called by the appellees, who testified that they did not hear any gong or bell ring; they were Celia Nelson and Erna Fritzenmeyer, but it is evidence from their testimony that while they were near enough to hear, they paid no attention to the street car as it approached the West street crossing, and that their attention was upon other matters. On the other hand, five witnesses who had full opportunity for observing, testify positively that the gong on the street car was sounded the length of a block before the West street crossing was reached, and was kept ringing almost to the instant of the collision. Frank Rummelhagen, the motorman in charge of the street car in question, but at the time of the trial no longer in appellant's employ, testified that he was driving the street car in question west on Stephenson street; that he rang the gong after crossing Grove street for the West street crossing; that he kept on ringing the gong as he approached West street; that, after crossing Grove street, he saw the milk wagon coming south on West street toward Stephenson street, and was ringing the bell at that time; that he saw the horse stop just as he came to the intersection of West and Stephenson streets, and seeing the horse stop he kept on going, but that the driver suddenly

reached out the other side of the wagon and gave the horse a crack with something and started it across just ahead of the car; that then he shut off the power and stopped the car as soon as he could, but could not stop it in time to avoid the collision.

E. J. Lichtenberger, and C. J. Lichtenberger, his wife, were passengers on the street car going out to the County Club where worked. Lichtenberger testified that he was riding on the front end of the car, which was going about five or six miles an hour as it approached the West street crossing; that the motorman not only rang the bell, but hollered to the man who was driving the milk wagon; that the car was running very slowly, and was nearly stopped when it collided with the wagon. Mrs. Lichtenberger testified that her attention wasn't particularly drawn to the wagon, but that she noticed the motorman was ringing the bell as they approached the crossing, and that the motorman also called out to the man in the milk wagon to look out before the wagon was struck. Walter Bauscher testified that he was at the northeast corner of West and Stephenson streets on his way to deliver papers at the time of the collision; that he saw the collision; that he heard the motorman ring his bell before the collision; that the motorman started to ring his bell down at the other street crossing, a block before he got to West street. William Saylor, a steam fitter by occupation, who was a passenger on the street car in question, testified that as the car was going along Stephenson street toward West street the bell was ringing for West street, and that he saw the milk wagon coming; that he quit looking at the wagon, but as the motorman kept on ringing his bell he looked again and then saw the milk wagon right in front of the car. From the positive testimony of all

these witnesses who apparently have no interest in the suit and who appear to be entirely credible, and had the best opportunity for knowing the facts about which they testify, it appears to be clearly established that the gong of the street car was rung more than fifty feet from the West street crossing, and was kept ringing until the car reached the crossing. The preponderance of this evidence is so strong that it must be regarded as conclusive against appellees' right to recover. Judgment is therefore reversed.

Statement of facts to be incorporated in the opinion.

We find that the appellant was not guilty of the negligence charged in the declaration.

Judgment reversed.

STATE OF ILLINOIS, {
SECOND DISTRICT. { ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

6581
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210 I.A. 531

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6491.

The People of the State of Illinois.

Defendant in error.

210 I.A. 531

vs

Error to Co. Ct. Lake.

Isaac Franklin,

Plaintiff in error.

Per Curiam:-

This is an information filed against Isaac Franklin in the County Court of Lake County charging him with the unlawful sale of intoxicating liquor. Defendant was tried on the plea of not guilty and was convicted and a judgment was entered against him from which he prosecutes this writ of error.

The information was not sworn to. It was therefore not a legal foundation for the prosecution of the plaintiff in error.

People v Clark, 220. Ill. 160; People v Honaker, 381 Ill. 396.

Plaintiff in error moved to quash the information before his plea of not guilty and moved in arrest of judgment and each of these motions was denied, and he has assigned those rulings for error here. He therefore raised the question properly in the court below and in this court and the State makes no answer to his contention here that the whole proceeding is void.

The judgment is therefore reversed.

185 A.1 019

March 1, 1961

Dear Mr. [Name]

Enclosed for you are

two

copies of the report

of the [Name]

of the [Name]

of the [Name]

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of the [Name]

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STATE OF ILLINOIS, }
SECOND DISTRICT. { ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this —
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

210 I.A. 532

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 25 1913

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6493

The People of the State of Illinois,
Defendant in error.

210 I.A. 532

vs

Error to Co. Ct. Lake.

Breger
Louis Breger, Plaintiff in error.

Per Curiam:

The record before us begins with an indictment against Louis Breger charging him with the unlawful sale of intoxicating liquor, which was returned in the circuit court of Lake County and certified to the County Court where certain proceedings thereunder were had apparently not disposing of the indictment. The indictment and proceedings just recited have no proper place in this record. Thereafter the record discloses an information against Louis Breger on like charges filed in the county court and his trial and conviction thereunder and a judgment against him. This writ of error is sued out to reverse that judgment and the proceedings back to the filing of the information; but has no bearing upon the indictment, which may or may not be still pending against the plaintiff in error.

The verification to the information was on information and belief. This was insufficient under People v Clark 280 Ill. 160 and People v Honaker, 281, Ill. 295. Plaintiff in error made a motion to quash the information and afterwards a motion in arrest of judgment and these motions were denied. He therefore raised the question in the court below and he has assigned those rulings for error in this court and the State does not answer his contention that the whole proceeding is void. The judgment is therefore reversed.

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STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



1575
4/356
210 I.A. 536

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

MAY 1 - 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:



Gen. No. 6575.

210 I.A. 536

Alice Shank, appellant.

va

Appeal from Stephanson.

Modern Woodmen of America,

appellee.

Per Curiam:

The only judgment in this record is against the plaintiff for costs upon a verdict for defendant. The proper form of a judgment for defendant and against plaintiff after a verdict for defendant is given in Town of Magnolia v Kayes 200 Ill. App. 122 where we cited many authorities.

To the same effect is People v Johnson 179 Ill. App. 407.

For the reasons there stated there is not a final judgment and the appeal was premature. We are not at liberty

to ignore this condition of the record, under Chicago Portrait Co. v Chicago Crayon Co. 217 Ill. 200. The appeal is therefore dismissed, with leave to appellant to withdraw her record, abstracts and briefs and to appellee to withdraw its briefs.

Appeal dismissed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

4057

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 537

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Otto Kluseneier,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

City

COURT

No. 4

October Term, 1917.

East St. Louis COUNTY

East St. Louis Bridge Company,

Appellant

TRIAL JUDGE

HON. W. M. VANDEVENTER

Term No. 4

In the Appellate Court
of Illinois, Fourth District.

Volume 12.

October Term A. D. 1917.

Eric Blusmeier, Appellee

vs.

East St. Louis Bridge Company,)
Appellant.

210 I.A. 537

Appeal from City Court

of East St. Louis.

Submitted

Opinion by ROGERS, W. J.

An action on the case was instituted in the City Court of East St. Louis by appellee, against appellant, East St. Louis Bridge Company, to recover damages for personal injuries sustained by him while in the employ of said Company.

The ground relied on for a recovery being that the injury was caused through the negligence of one of appellant's foremen. The declaration consists of two counts. The first count in substance alleges that appellant, a manufacturer of structural iron, had prior to the date of the injury sued for, elected not to pay compensation under the Workmen's Compensation Act. That appellee was working under the supervision and direction of appellant's foreman; that at the time of the injury complained of and while a certain iron beam was being raised by a crane and suspended some five feet above the ground appellee was directed to hold one end thereof; that thereupon the foreman of appellant who was at the other end of said beam negligently and carelessly pushed and jerked said beam and by reason thereof said beam became loose and detached from said crane and fell,

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striking appellee's foot, thereby crushing and mauling several of the bones thereof; that by reason of such injury appellee became permanently disabled and suffered great pain and agony, alleges damages, etc.

The second count was in substance the same as the first, except that the right of recovery was based on the alleged defective condition of the chain and hook used in hoisting said beam and charges as a result of said defective condition that the beam slipped off said hook, fell upon appellee's foot, injuring the same, etc.

On said declaration appellee filed a plea of the general issue. A trial was had, resulting in a verdict of \$100.00. Judgment was rendered thereon. To reverse said judgment this appeal is prosecuted.

The first ground relied upon by appellant for reversal of said judgment is that the court erred in not directing a verdict in its favor at the close of appellee's evidence, a motion and instruction being offered therefor. A motion of this character raises the question as to whether there is any evidence in the record fairly tending to prove the case made by the declaration. *Grain Co. v. Bryan*, 218 Ill.338; *Chicago City Ry. Co. v. Bulley*, 215 Ill.464;

Appellee in his own behalf testified in effect that when said beam which had been resting on a trestle, was being raised for the purpose of turning the same around; that the chain was hooked around the beam at the center; that he was standing at one end of the beam and that Charles J. Ford, foreman of appellant, was at the other end; that the end at which appellee was standing was obstructed by one of the machines used for riveting, called a "squeezing machine" or "bulldozer" and that he, appellee, placed his

hand on the end of said beam in order to push the same over this obstruction; that while the end in charge of appellee was resting on said machine, Lokenrod raised the other end causing said hook and chain to become loose and said beam to fall, striking appellee's foot and injuring it.

Appellee is corroborated by the testimony of John Spencer and Thomas Bruce, witnesses on his behalf and who were also employees of appellant at said time. Spencer testified: "When that end of the beam was on top of the machine the light end was a little high-- it was raised up on the machine; Klugebauer went around to raise it and the fellow on the other end took the weight of it; of course, the chain became loose and it came out of the hook across the block. It went right down on Klugebauer's foot." Bruce testified: "That appellee was at one end of the beam and Lokenrod at the other end. That the end in charge of appellee was resting on said machine known as the "squeezer" and that the beam was naturally caused to fall by Lokenrod's lifting." On objection the latter part of said answer was stricken. He then testified that he did not observe what Lokenrod was doing at the time the beam fell but that the end of the beam in charge of Lokenrod was not resting on the ground and that it was some foot and a half to two feet from the ground at the time the other end of the beam was resting on said machine. This evidence we think fairly tended to prove the allegations of appellee's declaration. The court, therefore, did not err in refusing to direct a verdict at the close of appellee's evidence.

A motion to direct a verdict was made at the close of all the evidence. A motion made at the close of all the

evidence amounts to a surmount to the evidence and as we have said the evidence offered on the part of appellee fairly tended to prove the averments of his declaration and while Chenard denied having lifted said beam while the same was being hoisted, and also denied having been at the end of the beam opposite appellee at the time of the injury, still his testimony is contradicted by appellee, by Jones and by Spencer, all of whom testified that Chenard was at the opposite end of the beam and was in charge of the beam at the time the same was being hoisted. The court did not err in refusing to direct a verdict for appellant at the close of the evidence.

It is next contended by appellant that there was a variance between the evidence offered by appellee and the averments of his declaration. This question is raised for the first time in this court. Not having been raised in the court below, the only question for us to determine is as to whether the evidence offered by appellee was descriptive of a different cause of action from that alleged in his declaration. The declaration charges that appellant's foreman negligently and carelessly pushed and jerked said iron beam, causing the same to be loosed from said crane, while the evidence tends to prove instead of pushing or jerking said beam, he lifted the end of the same while the other end rested on said machine, thereby loosing said beam from said crane, causing the same to fall. We do not think however that the evidence in effect states a cause of action so different in its description from that charged in the declaration as to deprive appellee from a right of recovery when the objection of said variance was not made in the trial court

where a party would have had an opportunity to amend his pleadings to correspond with the evidence. The rule is that in order to avail of a material variance between allegations and proofs, the testimony must be specifically objected to at the time it is offered, and the variance pointed out. Illinois Life Ass'n. v. Wells, 200 Ill.445-453. Traders' Mutual Life Ins. Co. v. Johnson, 200 Ill.359-362. Illinois Terminal R.R.Co. v. Thompson, 210 Ill.226-233.

In the last mentioned case on page 233 the court says: "It is said that the proof does not sustain these allegations, because the proof showed that the Illinois Glass Company erected the telegraph pole, or permitted it to be erected, and that the Illinois Glass Company, and not appellant, was the owner both of the tracks and of the switch yard.

In the first place, it is a sufficient answer to this contention that counsel for appellant did not specifically call the attention of the trial court to the variance in question, when the evidence was introduced. A party, in order to avail himself of a variance between the proof and the declaration in a court of review, must show from the record that the alleged variance was specifically called to the attention of the trial court, so that thereby the opposite party could have an opportunity to amend his pleadings." Citing Wright Fire-Proofing Co. v. Rozzekel, 150 Ill.159; Chicago, Rock Island and Pacific Railway Co. v. Clough, 154 Ill. 586; Chicago and Grand Trunk Railway Co. v. Spurney, 157 Ill.471; Traders' Mutual Life Ins. Co. v. Johnson, 200 Ill. 359; Illinois Life Assn. v. Wells, 200 Ill.445; Chicago and Eastern Illinois Railroad Co. v. Fuller, 198 Ill.6; Lake Shore and Michigan Southern Railway Co. v. Ward, 189 Ill.511."

He therefore held that the objection of appellee not having been made in the court below cannot be availed of here.

It is next urged by appellant that the court erred in refusing to admit in evidence a letter written by William J. Borders, attorney for appellee, which letter in substance contended contained an admission that appellee had recovered from his injuries at an earlier date than he testified to at the trial. An examination of this letter discloses that it was written for the purpose of ascertaining if a settlement or compromise of appellee's claim could not be had. While the letter stated that appellee was out again, still while the whole letter into consideration the court did not err in refusing to admit the same, so to have allowed the letter to have gone to the jury would have prejudiced the rights of appellee and we do not believe that appellant's rights were seriously affected by the refusal of the court to admit said letter. Negotiations or an offer of compromise are not admissible in evidence. *Loam v. Hollenbeck*, 160 App. 429.

It is next insisted that the court erred in permitting appellee to prove the substance of the notice posted by appellant at its working place to the effect it had elected not to be governed by the provisions of the Workmen's Compensation Act. A certified copy of the notice filed by appellant with the Industrial Board electing not to pay compensation under the Workmen's Compensation Act having been given in evidence, we are of the opinion that the court did not err in permitting appellee to testify to the substance of the notice posted by appellant at its working place. While appellee's testimony was not very satis-

factory as to what this notice contained, at the same time we hold that the testimony of appellee, in connection with the certified copy of the notice filed with the Industrial Board was sufficient proof that appellant had elected not to be governed by the provisions of said act. The record discloses that notice had been given appellant prior to the day of the trial to produce a copy of the notice wanted. Not having done so, we are of the opinion that it is in no position to complain of the ruling of the court in permitting appellee to give in evidence the substance of said notice.

It is next contended by appellant that the court erred in its rulings on the instructions. Two instructions were given on behalf of appellee, and ten instructions were given on behalf of appellant. It is contended by appellant that the court erred in giving appellee's second instruction. Said instruction informed the jury that in case they found the issues for the plaintiff then in assessing plaintiff's damages they might take into consideration the nature and extent of injury, together with the probable duration thereof, if any, shown by the evidence, the plaintiff's pain and suffering, if any, shown by the evidence, his loss of time and earnings during his sickness and disability to work, if shown by the evidence. It is insisted that this instruction does not require the jury to find the issues from a preponderance of the evidence. The instruction does not assume to instruct the jury except as to the matters to be taken into consideration by them in determining the amount of appellee's recovery, provided they found the issues in his favor. This instruction in substantially the same form has been given a great many times and has not been seriously criticised by the courts. The court did not err in giving said instruction.

It is next contended by appellant that the court erred in refusing to give the four instructions tendered by appellant and which were refused by the court. Appellant's first refused instruction required that appellee prove that he was in the exercise of due care and caution for his own safety at the time of the injury before he could establish his right of recovery. Appellant having elected not to say compensation under the Workmen's Compensation Act, it took away its right to the defense of contributory negligence, fellow servant and assumed risk. The court therefore did not err in refusing this instruction.

Appellant's second and third refused instructions were in effect covered by other instructions given by the court at the instance of appellant and it was not necessary to further instruct the jury on those matters.

The fourth instruction was involved and in the form tendered would have been misleading to the jury and the court did not err in refusing the same.

Lastly, it is contended that the verdict is excessive and that it must necessarily have been the result of prejudice or passion on the part of the jury. While we are of the opinion that the verdict is pretty liberal, in view of the injuries sustained, at the same time we are not prepared to say that the verdict is so excessive as that we can say it is the result of prejudice or passion. The injury sustained by appellee was a serious one and the undisputed evidence is to the effect that he was incapacitated for some two or three months; that two of his toes that were injured are still stiff--that he cannot flex them; that he has to wear a shoe that is two sizes too large and that he has to

wear braces in order to protect his foot. There is also some evidence in the record tending to show that the injury is a permanent one. We cannot therefore not be warranted in reversing this judgment on account of the size of the verdict.

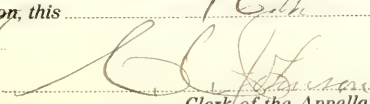
finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of April, A. D. 1918.


Clerk of the Appellate Court.

OPINION

FEE, \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

- Hon. Franklin H. Boggs, Presiding Justice.
- Hon. Harry Higbee, Justice.
- Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 574

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{22nd}~~5th~~ day of ^{June}~~April~~, A. D. 1918, there was ^{refiled}~~filed~~ in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

George C. Bandy,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 20

October Term, 1917.

Madison COUNTY

Litchfield & Madison Railway Co.,

Appellant

TRIAL JUDGE

HON. LOUIS BERNREUTER



Term No. 25.

In the appellate court
of Illinois, fourth district.

Appellate No. 574

October Term, A. D. 1917.

George C. Handy, Appellee

vs.

Fitchfield & Madison Railway
Company, Appellant.

210 I.A. 574

Appeal from Circuit Court

Madison County, Illinois.

Opinion by Rogers, J.

This appeal is prosecuted to reverse a judgment for \$2685.00 rendered by the Circuit Court of Madison County, in an action of case brought by appellee against appellant to recover damages for personal injuries received by appellee on May 23, 1914, at which time appellee was thrown from a motor-car driven by C. A. Nickel, train dispatcher for appellant. The declaration charged negligent and improper conduct on the part of Nickel in driving said motor-car by reason whereof the same ran against a dog that was on the track near a bridge or trestle on appellants' railroad, causing said car to be de-railed and appellee thrown therefrom as above stated.

This case has been tried four times. The verdict and judgment in the first two trials being in favor of appellee were on appeal in this court reversed and remanded on the ground that said verdicts were against the weight of the evidence. Handy v. Fitchfield & Madison Railway Co. 183 App. 422; Handy v. Fitchfield & Madison Railway Co. 196 App. 567.

The record discloses that on the third trial in said Circuit Court a verdict in favor of appellee, was,

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on motion of appellant, set aside and a new trial ordered. The fourth trial resulted in a verdict and judgment in favor of appellee and said judgment is now before this court for review. The facts in this case are sufficiently set out in the case of *Landy v. Litchfield & Madison Railway Co.*, 196 App. 568, to which reference is hereby made and it is therefore not necessary to repeat the same here.

It is proper also to observe that since said car was one of the parties being carried upon said cotton-car at the time appellee was injured was himself injured and prosecuted a suit against appellant alleging the same negligent cause in the operation of said car that are charged in this case. A verdict and judgment in his favor was reversed on appeal in this court on the ground that the verdict was against the manifest weight of the evidence. *Schmidt v. Litchfield & Madison Railway Co.*, 179 App. 533.

It is now insisted by appellee that the judgment on this appeal should be affirmed for the reason that the record contains the testimony of two additional witnesses whose testimony tends to corroborate and support the testimony of the other witnesses for appellee and impeach the testimony of Michel who was operating the car of appellant at the time of the injury. We have carefully read the testimony of both of these witnesses, and we fail to find that such testimony materially tends to corroborate the evidence of appellee's witnesses or impeach the testimony of Michel. We have, as heretofore stated, held in *Landy v. Litchfield & Madison Railway Company* 193 App. 492 and 196 App. 568, and in *Schmidt vs. Litchfield & Madison Railway Company*, 179 App. 533, that the verdicts of the jury were against the manifest

weight of the evidence. No new evidence material to the issue being contained in the record on this appeal we are constrained to hold that the judgment of the lower court should be reversed as we consider ourselves bound by the findings made on the former appeals in this case and on the findings made in the case of *Smith vs. Hitchfield & Indian Railway Company, supra*.

Where a case is reversed by an appellate court and remanded for a new trial, the principles governing an appellate tribunal in its opinion, are controlled by the same in the court to which the case is remanded and upon appeal from a judgment rendered upon such remandment, must control if the case presented upon the second trial and appeal is the same case as the case in which the opinion was filed reversing and remanding the case. *People State Bank v. W. J. J. Rice Co.*, 216 Ill. 572; *Siegel v. Green*, 221 Ill. 132; *Anders v. Hall*, 119 Ill. 88.

In the last mentioned case this court 30 years ago said: "The second trial of the case, which also resulted in a judgment in favor of Hall, was had upon the same pleadings as the first and the same facts were shown in substance. At this trial, however, appellee introduced six new witnesses none of whom had testified on the former occasion..... The new evidence introduced by appellee upon the second trial does not appear to us to have made any substantial change in the condition of that phase of the case, which relates to the right of appellee to maintain a suit in replevin for the value of the entire stock of goods, and there is therefore nothing to warrant us in making a different ruling from

that made when the case was here before."

We are of the opinion and so hold that the verdict on this present case is manifestly against the weight of the evidence and for said reason the judgment rendered thereon will be reversed and the cause remanded.

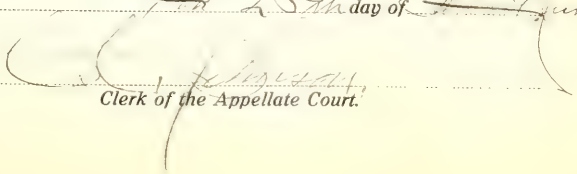
REVERSED AND REMANDED.

Not to be reported in full.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 25th day of June A. D. 1911


Clerk of the Appellate Court.

OPINION

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FEE, \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

✓ Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 575

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The Joliet Bridge & Iron Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

vs.

City COURT

No. 21

October Term, 1917.

East St. Louis COUNTY

East Side Levee & Sanitary District,
Appellee

TRIAL JUDGE

HON. W. M. VANDEVENTER

Term No. 21.

In the Appellate Court

Volume No. 7

of Illinois, Fourth District

October Term, A. D. 1917.

The Joliet Bridge & Iron Company,

Appellant

vs.

The East Side Levee and Sanitary
District, Appellee

210 I.A. 575

Appeal from City Court

East St. Louis.

Opinion by Judges, J. J.

An action in assumpsit was brought in the City Court of East St. Louis, by appellant, the Joliet Bridge & Iron Company, against appellee, The East Side Levee and Sanitary District, to recover a balance alleged to be due for material furnished and labor performed in constructing four bridges in said district, and for the expenses incurred in removing and re-placing a span in one of said bridges. At the close of the evidence the court directed a verdict in favor of appellee, and rendered judgment thereon. To said ruling appellant excepted and prosecutes this appeal.

The declaration consists of eight counts. Two of said counts being the common counts, the remaining six counts in varying form declare on the contract entered into between appellant and appellee for the construction of said above mentioned bridges, for extra work and materials, incident thereto and for damages alleged to have been suffered by appellant by reason of the failure of appellee to keep and perform said contract on its part.

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Appellee filed a plea of the general issue and a stipulation was entered into by said parties to the effect that all evidence proper to be considered under proper special pleas should be admitted under the general issue.

On February 14, 1910, appellee, The East Side Levee and Sanitary District, a municipal corporation, passed an ordinance designated ordinance No. 5, providing for the digging of a diversion channel to change the head waters of Cahokia Creek from the bluffs to the Mississippi river. This channel is four or five miles long, approximately 15 feet wide and eight or ten feet deep with levees on either side. On November 23, 1910, appellee passed another ordinance designated ordinance No. 11, providing for high-way bridges to be constructed across said channel. Specifications were prepared, said work was advertised and on the letting, appellant was the successful bidder. On January 16, 1911, a contract was entered into between appellee and appellant for the construction of said bridges which said contract made said above mentioned ordinances, advertisements, specifications, etc., a part thereof.

Under said contract appellant was to construct said four mentioned bridges under the supervision, order and direction of the Chief engineer of appellee. The work was to be commenced upon notice given by said engineer and was to be completed within a specified time, all under the direction of said engineer and to his satisfaction.

The record discloses that the work proceeded under said contract until bridges Nos. 1, 2 and 3 had been constructed. While the work on bridge No. 4 was in progress, the engineer of appellee directed that the work be suspended.

At a later date after three of the spans of bridge four had been erected by appellant, said engineer directed that the north sixty foot span of said bridge be removed by appellant in order to permit a drag line of another contractor to pass. The direction to remove said span was in writing and in compliance therewith appellant removed the same at an expense and cost as claimed by it, of \$2557.52.

In April 1912, the entire work being finally completed, the president of appellant company furnished an affidavit in accordance with the contract that all claims for labor and material incurred by appellant under said contract had been fully paid and discharged. Upon the filing of said affidavit by appellant the chief engineer of appellee caused final estimates to be made covering all the work under the contract and certain extra work. On May 10, 1912 final checks, vouchers and receipt were mailed to appellant, one check for \$6398.40 for work and labor performed and material furnished under the contract, and another check for \$517.40 for extra work and materials.

At the time of the mailing of said checks appellee through its clerk sent appellant the following letter:

"Herewith I am enclosing you voucher nos. 2564 and 2565 with warrants payable to you. I am also enclosing final receipt which please sign and return at your earliest convenience. Please receipt the vouchers at the usual place, and return to us by registered mail in order that they may not be misplaced or lost in transit."

The receipt sent with this letter and said check is as follows:

Joliet, Ill., 1912.

We hereby acknowledge receipt from The East Side Levee &

Sanitary District of warrant No. 2064 for \$6,308.48 and warrant No. 2065 for \$217.50 being in full and complete payment for labor and material furnished in the construction of four highway bridges, being part of construction Project No. 1, LaSakia Creek Diversion Channel, under contract dated May 14, 1911, and under requisition for extra work No. 1, and the said The West Side Levee and Sanitary District is hereby completely and fully discharged from any further liability under said contract and order for extra work.

Joint Bridge & Iron Company,
Voucher 2064.

BY _____

President.

Appellant cashed said checks but failed to sign and return said receipt, and wrote appellee to the effect that said check would be placed to its account by appellant but that there remained a balance due from appellee to appellant for extras. An itemized statement of which was sent to appellee. Said statement included said item of \$257.92 for removing and re-placing said span in Bridge No. 4 together with an itemized account of the time of the men employed by appellant in storing tools, closing down work, taking down and putting up derrick and other apparatus in connection with the removal and the replacing of said span and the completion of said bridge. The total amount claimed by appellant including said item of \$257.92 amounts to \$5180.55.

It is insisted by appellant that under the provisions of the contract entered into between it and appellee for the construction of said bridges that the expenses incurred in the removal of said span, the re-placing of the same and the expenses and loss incurred by appellant by

reason of the suspension of the work on said bridge was not contemplated by said contract and that inasmuch as work was suspended and said span of said bridge removed under the direction of the engineer of appellee, that appellee would be liable therefor and that the court erred in directing a verdict for appellee.

Appellee insists that under the provision of said contract, first, that even though the work in connection with the removal and replacing of said span in bridge No. 4 should be held to be extra work and not covered by the contract between said parties, that inasmuch as no estimate was first made by said engineer as to the cost of the removal and replacing of said span as provided by the contract entered into between said parties, that therefore appellee would not be bound by the action of said engineer and would not be liable for said expenses; second, that the expenses incurred by appellant in connection with the removal of said span in bridge No. 4 and the replacing of the same was one of the incidents in connection with the construction of said work under said contract and that no liability rested on appellee by reason thereof, and third, that even though a liability existed for said expenses that the acceptance of the checks mailed by appellee which purported to be in full of the amount due on the contract and for extras amounted to an accord and satisfaction.

A careful reading of said ordinances, the specifications and the contract entered into between said parties and which includes as a part thereof said ordinance, specifications, advertisement, etc. leads us to the conclusion that the judgment in this case should be affirmed for the

reason no estimate was made by the engineer as to the cost thereof and no agreement was made by the applicant with any officer in reference thereto, as provided by said contract.

Section 38 of the specifications provides: "No claims whatever shall at any time be made upon the West Side Levee and Sanitary District by the contractor, for or on account of any extra work or material, performed or furnished, or alleged to have been performed or furnished; unless such extra work or materials shall have been expressly required in writing by the engineer in charge, the prices and quantities thereof having been first agreed upon and approved by the engineer in charge."

Section 39 of the specifications provides: "No charge shall be made by the contractor for hindrances or delays from any cause whatever in the progress of the work, but such hindrances or delays may entitle him to an extension of the time allowed for the completion of the work, as provided in paragraph 30 above."

Section 40 of the specifications provides: "The right is reserved to make such changes in the plans and specifications as are not otherwise provided for as may from time to time appear necessary or desirable and such changes shall in no wise invalidate this contract. Should such changes be productive of increased cost to the contractor, a fair and equitable sum therefor to be agreed upon in writing before such changed work shall have been started shall be added to the contract price, and in like manner deductions shall be made."

Paragraph 14 of the contract provides: "Should the Sanitary District deem it proper or necessary, in the case-

cution of the work herein undertaken by the contractor to make any alterations, changes or additions which shall increase or diminish the expense, said alteration, change or addition shall not vitiate or annul the contract or agreement hereby entered into, but the chief engineer of such district shall determine the value of the work so added or omitted and reduce to writing the change or addition and the value of the same before such change or addition shall be made, and a copy of the same shall be furnished to the contractor, such value to be added to or to be deducted from the contract price, as the case may be."

Without quoting further from the contract or the specifications in connection with the manner in which extras may be claimed for, it is abundantly apparent from the foregoing provisions of said specifications and contract that in order to charge appellee for any work, material or other expenses as extras, said work, materials or expenses must have been estimated in writing by the engineer prior to said work being done or said expense being incurred, a copy of which estimate was to be held by said contractor. No attempt was made by appellant to prove a compliance with this provision of said contract and specifications. We are therefore of the opinion and so hold that without such proof being made appellant was not entitled to recover for such alleged extra work, material and expense. The provisions of said contract with reference to how a liability for extra work, material or other expenses may be incurred being clear and explicit it is the duty of the court to enforce said contract according to its terms. *West v. Canney Refrigerator Co.* 201 Ill.563; *Mutual Life Ins.Co.v.Helme*, 189 App.422.

It is insisted by appellee that the provisions of the contract in question are broad enough in its terms to make the appellant liable for the expenses incurred by it in the removal of said span from said bridge No. 4 and that no right of recovery would lie therefor, even though the method provided for in the contract had been followed with reference to ascertaining the expenses in connection therewith prior to the time that said span was removed. It will not be necessary for us to pass on this proposition inasmuch as our holding is that appellee is not liable in view of the fact that the provision of the contract with reference to extras was not followed, still we are inclined to the opinion that before the appellant would be entitled to recover against appellee for said labor, material and other expenses incident to the removal of said span and the re-placing of the same in bridge No. 4, it must have shown not only that the expenses incident thereto had been previously ascertained as provided in the contract but it should also be shown in the absence of an agreement on the part of appellee to pay therefor that the removal of said span in bridge 4 was for the benefit of appellee, Drainage district, rather than for the benefit of another independent contractor who had the contract for ~~the~~ dredging said channel. In other words, there is nothing in the contract or in the evidence warranting the conclusion that appellee, drainage district, should be liable for this expense rather than some other independent contractor.

The evidence in the record tends to prove an accord and satisfaction as contended by appellee but we prefer to base our judgment affirming the trial court on the fact

that appellant failed to show a right of recovery under the provisions of the contract entered into between said parties.

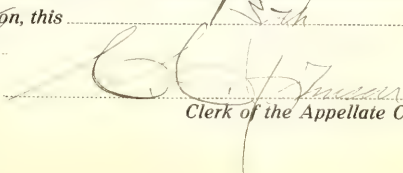
Finding no error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 13th day of April
A. D. 1916


Clerk of the Appellate Court.

OPINION

FEE, \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 586

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Village of Carrier Mills, Ill.,

Appellant

~~ERROR TO~~

APPEAL FROM

vs.

Circuit

COURT

No. 27

October Term, 1917.

Saline

COUNTY

Lou Pritchard,

Appellee

TRIAL JUDGE

HON.

A. W. LEWIS

Term No. 27

In the Appellate Court

Appendix No. 40.

of Illinois, Fourth District

October Term A. D. 1917.

Village of Carrier Mills,)

Illinois, Appellant)

vs.)

John Britchard, Appellee)

210 I.A. 586

Appeal from Saline County

Circuit Court.

Opinion by Boggs, J.

This appeal is prosecuted to reverse a judgment for \$1000.00 rendered by the Circuit Court of Saline County in favor of appellee and against appellant in an action on the case brought to recover for injuries sustained by appellee. The declaration charges that appellant was negligent in failing to keep and maintain a certain plank crossing in a reasonably safe condition; that the public was compelled to use the crossing and that appellee in so using the same was injured while in the exercise of due care for her own safety.

This case was before this Court at the October Term 1915, and on the 17th day of April 1916, a judgment was entered reversing and remanding said cause for the reason that the verdict of the jury was against the manifest weight of the evidence and for erroneous rulings on the instructions. The facts in the record on this second appeal are substantially the same as those on the first appeal and as the facts are pretty fully set out in the opinion on the former trial in this Court it will not be necessary for us

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to set them out here in detail.

The record discloses that Oak street, runs east and west through the business part of Carrier Mills, a village of about 2000 inhabitants; that some two blocks east of the business portion of the city it is intersected by a thirty foot street running north and south which has no name. Along the west side of the unnamed street where it crosses Oak street, is an open ditch eleven feet wide and across this ditch in the center of Oak street is a bridge sixteen feet in length from north to south. North of this bridge some six or eight feet a plank had been placed across the ditch by a man by the name of Miller who testified that he so placed the same at the instance of the President of the Village Board. The plank referred to was about fourteen feet long, two inches thick and about eight inches wide. The record discloses that there was no sidewalk on the south side of Oak street leading up to the unnamed street, and those living or traveling along that side would cross over to the north side, where there was a sidewalk leading up to the thirty foot street. There was a path from the sidewalk to the bridge along which some cinders had been placed and in fair weather the path and the bridge were used by foot passengers, but in muddy weather the plank was generally used in crossing said ditch.

The record further discloses that on the 3rd day of January, about 1:30 o'clock in the afternoon, appellee a woman of about 45 years of age, weighing about 165 pounds was returning to her home from the business part of the village of Carrier Mills, carrying three bundles, when she reached the ground which had been frozen early in the day but

had then thawed on the surface, and was somewhat muddy and sloppy. Appellee testified in attempting to cross on said plank her foot slipped, she fell and received the injury complained of.

It is first contended by appellant that the evidence on the present appeal is practically the same as on the former appeal and that the finding by this court that the verdict of the jury was against the undisputed weight of the evidence was binding on the trial court and on this court and that for said reason the judgment should be reversed.

Appellee concedes that in the record in this case is the same or is substantially the same as on the former appeal that the contention of appellant would be right, but it is insisted by appellee that the record on this appeal is substantially different from the record on the former appeal.

Appellee insists that the record differs on this appeal from the former in the following particulars:

1. The physical condition of Oak street in the neighborhood of the wooden bridge as well as the approach to the bridge and the drains or ditches on either side of the main ditch across which the plank lay.

2. Also the physical condition of appellee with reference to the condition of her health, the use of her legs, arms and sight.

3. Evidence that the feet of the plaintiff were not muddy or slick as she had traveled on a well beaten cinder path which was not muddy.

4. Also evidence as to the size, contents and manner of handling and packing of the three small bundles which she carried under her arm.

5. The record is a different record at this time on account of the instructions for the plaintiff conforming to the prior opinion of the Appellate Court in the above particular."

We have examined the record with reference to the points specified but do not find that there is any substantial difference in the evidence on this appeal and on the former appeal. The surroundings of said bridge and at the place where the plank was put across the ditch is practically the same as on the former appeal. As to the physical condition of appellee, the record shows her age, weight, etc. to be practically the same as before.

On the second trial appellee testified in chief that her feet were not muddy but she afterwards said that they may have been damp and that they may have been some muddy, but she did not think enough to hurt. The evidence discloses that the ground had been frozen and was thawing and the streets were more or less muddy at the time of the injury so there is no substantial difference in the evidence in that regard.

There was no evidence in the record showing the size or contents of the three bundles carried by appellee on the former trial but on this appeal the evidence discloses that the bundles were small, but we fail to see that that fact can make any serious difference with reference to the question of the exercise of due care on the part of appellee.

We therefore hold that the record on this appeal being substantially the same as the record on the former appeal, that the court is bound by its former holding to the effect that the verdict is against the manifest weight of

the evidence.

The opinion and judgment of the Appellate Court on one appeal in a cause is binding upon it and upon the trial court, and questions there determined cannot be reviewed on subsequent appeals in the cause when the record is the same or substantially so. *Donahoe v. The Ohio Oil Co.* 121 App. 136; *Hammer v. State of New York*, 175 App. 559; *Handy vs. Mitchell*; *Illinois Railway Co.* 183 App. 492; *Hammer v. State of New York* 186 Ill. 468; *Westbrook v. Frederickson*, 27 Ill. 41.

It is insisted by appellant that the court erred in its rulings on the instructions. The seventh instruction given on behalf of appellee is erroneous among other things for the reason that it is assumed by the court that the plank in question constituted a sidewalk. That was a question of fact for the jury, especially in view of the evidence in this record which tends to show that the Village Board placed said plank across said ditch or that it took possession or control of the same.

The record rather discloses that the plank was kept there by the man alone, and that the same was used by the public without the city or such having anything to do with it or without the city ever in effect having adopted the use of said plank as a crossing for the public. The record tends to show that the bridge in question was constructed by the city, not only for ~~horses~~ horses and vehicles but for pedestrian travel as well.

The ninth instruction given on behalf of appellee is erroneous for the reason that the court in said instruction assumes that it was the duty of the Village Board to

look after said crossing. We understand the law to be that where a city or village undertakes to construct a sidewalk or take control of a sidewalk constructed by others, that it then becomes the duty of said city or village to keep said sidewalk in a reasonable state of repair, but it is a serious question in this case as to whether the village as such either directly or indirectly adopted this plank placed there by a third party as a part of the sidewalk system of the village.

Instruction No. 12 given on the part of appellee is misleading in that it in effect assumes that the plank in question was in the possession and control of said village and that the same constituted a sidewalk. A large part of the argument of counsel for appellee was devoted to the proposition that a person in traveling in a city or village is not obliged to take another route to the place they are going simply because it may be a safer one than the route selected, provided that in selecting the route used even though it was more or less unsafe that they at the time were in the exercise of ordinary care for their own safety. Appellee's contention is no doubt correct and supported by the authorities. The question here, however, is as to whether or not the plank in question was a sidewalk in the possession and control of the village. The evidence tends strongly to show that the said bridge constructed by the city was the only crossing provided by said village on said street at said place.

For the reason that the record discloses that appellee was not in the exercise of due care for her own safety,

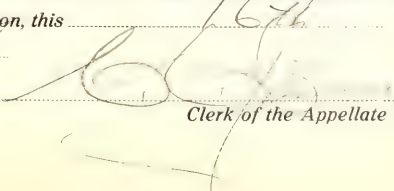
just prior to and at the time of her injury and that the verdict thereon was against the manifest weight of the evidence and for the giving of the erroneous instructions above set forth, the judgment of the trial court will be reversed and the case will be remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 16th day of June
A. D. 1918


Clerk of the Appellate Court.

OPINION

PER, §

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 598

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Pete Pochco,

Appellee

~~ERROR TO~~

APPEAL FROM

vs.

City

COURT

No. 31

October Term, 1917.

Alton

COUNTY

The Illinois Terminal Railroad Co.

etc. Appellant

TRIAL JUDGE

HON. L. D. YAGER

Term No. 31.

In the Appellate Court
of Illinois, Fourth District
October Term, A. D. 1917.

Agenda No. 43

Pete Rodice, Appellee

Vs.

The Illinois Terminal Railroad
Company, Impleaded with the
Missouri and Illinois Bridge
and Belt Railway Company

Appellant

210 I.A. 598

Appeal from City Court

Alton, Illinois.

Opinion by Boggs, J. J.

An action on the case was instituted in the City Court of Alton by appellee, against appellant, the Illinois Terminal Railroad Company, and the Missouri and Illinois Bridge and Belt Railway Company to recover for injuries sustained by appellee alleged to have been caused by the negligence of said defendants. The declaration consists of three counts. The first count charges negligence generally on the part of appellant and said co-defendant. The second count is based on the alleged violation of the ordinances of the City of Alton limiting the speed of locomotive engines or trains running through said city to a speed of not more than ten miles per hour. The third count is based on the alleged violation of the ordinances of the city of Alton which required that the bell on each locomotive engine shall be rung continuously while running through said city. All of said counts allege due care on the part of appellee prior to and at the time of the injury in question. To said declaration appellant and its co-defendant filed a plea of the general issue. In addition thereto, the Missouri and Illinois

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Bridge and Belt Company filed a special plea alleging that at the time of the injury appellee was in the employ of the Sinsler Construction Co.; that the injury complained of was accidental, arising in the course of said employment; that the Sinsler Construction Co. was liable under the Workmen's Compensation act for any damages due therefrom and that appellant and said Missouri and Illinois Bridge and Belt Co. were not liable.

A demurrer was sustained to this plea. Said plea was afterwards amended, and a demurrer thereto was again sustained, a trial was had resulting in a verdict in favor of appellee and against appellant in the sum of \$43,000 and of not guilty as to its co-defendant. Judgment was rendered on said verdict, and to reverse the same this appeal is prosecuted.

It is first insisted by appellant that the court erred in refusing to direct a verdict in favor of appellant at the close of appellee's evidence and again at the close of all the evidence. Without going into a detailed discussion it is only necessary to say that the evidence of appellee, with the inferences reasonably to be drawn therefrom fairly tended to prove the averments of his declaration, the court therefore did not err in refusing to direct a verdict in favor of appellant.

It is next insisted by appellant that the court erred in admitting in evidence the ordinance of the City of Alton limiting the speed of trains in said city, for the reason that said ordinance contains a provision, "that the Chicago & Alton Railroad Co. can run its trains going northward from the Union Depot in said city at such speed, not

exceeding fifteen miles per hour, or may be necessary to pass over the ascending grade of its tracks."

The insistence of appellant is that the ordinance is void for the reason that it is discriminatory in favor of the Chicago & Alton Railroad Company. Without passing on the question as to whether or not the reason on which the proviso purports to be based is sufficient to show that, that part of the Chicago & Alton Railroad referred to comes within a definite class, it is only necessary to say that the proviso would not render the entire ordinance void. The only effect that it would have would be to render the proviso void. The remainder of the ordinance being separate and distinct from the proviso would stand. The court did not err in admitting said ordinance.

It is next insisted by appellant that the verdict of the jury is against the manifest weight of the evidence. The insistence of appellant being that appellee, prior to and at the time of the injury was not in the exercise of due care for his own safety, and that if negligent at all, the negligence of appellant was not the proximate cause of appellee's injury.

The evidence with reference to whether or not appellee prior to and at the time of said injury received by him was in the exercise of due care for his own safety was conflicting. The record discloses that appellee was injured at or near Ridge street in the city of Alton. Said street runs north and south through said city. The tracks of the Big Four, Chicago and Alton, appellant and the C. & A. St. L. Ry. Co. cross said Ridge street near the place where appellee was injured, practically at right angles. Passing south on

Ridge street you come, first to the tracks of the Big Four, next to those of the Chicago & Alton, then to appellant's track and lastly, to the tracks of the C.P. & St. L. Ry. The record discloses that in all there were some ten or twelve tracks crossing said street in close proximity. The distance between the south track of the Chicago & Alton and the north track of appellant, railroad, is about twenty feet.

The evidence of appellee tends to prove that on the morning of July 30, 1916, at about the hour of six A.M. he was walking south along Ridge street, and after having passed the tracks of the Big Four he was stopped by a train on the Chicago & Alton. Appellee testified that he looked both to the right and left and seeing no train and hearing no bell rung or whistle sounded, proceeded to cross the track of appellant, railway, when he was struck and knocked down by an engine, the wheels of the engine passing over appellee's right foot. Appellee further testified that after the Chicago & Alton train had passed there was a light smoke and that it was more or less dark at the time in question. Appellee is corroborated in his testimony by the witness Glenn Reed, being the only witness on either side who claimed to have seen the accident. He testified that on the morning in question he was standing on his back porch some half a block away from where the accident occurred and saw appellee walk south from what was then called, Second street, on Ridge street; that he saw a train of cars on the Chicago & Alton going east crossing Ridge street a few feet south of where appellee was standing and as the last car of said train passed, appellee started to cross the tracks of appellant when an engine on the Missouri & Illinois Bridge and Belt Railway Co. struck him; that the engine was backing;

that it was coming from the east and was going west. Said witness further testified that he heard no bell rung nor whistle sounded prior to the accident.

On the part of appellant, the witness, Theodore Michaels testified that he was a hestler in the employ of appellant; that as such hestler, he was taking said engine from the round house of appellant for delivery to the Missouri and Illinois Bridge and Bolt Company and that it was while so delivering the same said accident occurred. This witness further testified that he was in sole charge of the engine, and was backing the same east; that he did not see appellee at the time he was struck but that he had seen him prior thereto and that appellee was walking in a longitudinal direction along the right of way of appellant in the same direction that his engine was traveling. His testimony further tends to the effect that appellee was not struck on Bridge street but a few feet east of the same. Michaels also testified to having blown the whistle several times but does not testify that he rung any bell. In fact there is no evidence in the record tending to prove that a bell was rung. Certain other witnesses on the part of appellant and one or two witnesses on the part of appellee testified to the effect that shortly after said accident, appellee was sitting near a post a few feet east of Bridge street. Appellee, however, testified that being afraid of being run over and further injured he crawled a few feet east in order to get off the street. The evidence tended to prove that said engine prior to and at the time of crossing Bridge street was running from ten to eleven miles per hour. One of the witnesses on the part of appellee testified that the engine was running very

fact, as fast as it could, but finally testified it was running something like ten or eleven miles per hour. The evidence being conflicting it was a question of fact for the jury as to whether appellant was guilty of negligence as charged and whether said negligence was the proximate cause of appellee's injury and also as to whether appellee was prior to and at the time of the injury, in the exercise of due care for his own safety.

It was strenuously insisted by appellant that if appellee had looked prior to going on the track of appellant that he would have seen the engine approaching and that the court should find as a matter of law that he was guilty of contributory negligence, notwithstanding the fact that he testified that he looked in each direction before passing on said track.

It has frequently been held by the Supreme Court and by the Appellate Courts of this state that it cannot be said as a matter of law that failure to look and listen under all circumstances will bar a recovery. It is usually a question of fact for the jury to determine in view of all the surrounding circumstances whether a failure to look and listen constituted negligence or lack of due care. *Gibbons v. A.R.R. Co.*, 263 Ill. 257; *Gunn v. C.R.R. & St.L.Ry. Co.*, 239 Ill. 132; *Mukewen v. C.R.R. & St.L.*, 237 Ill. 104; *C.R.R. & St.L. Co. v. Sullivan*, 205 Ill. 486.

In this case the record tended to prove that appellant's engine was backing at the rate of ten or eleven miles per hour toward Bridge street without ringing a bell or sounding a whistle; that appellee's attention was more or less directed toward the C. & N. train that had just passed and that it was more or less smoky from said passing train.

It was therefore, in view of the surrounding circumstances, a question of fact for the jury as to whether appellee was in the exercise of ordinary care for his own safety prior to and at the time of his injury and we are not disposed to disturb their finding.

It is next insisted that the court erred in giving the first and second instructions given on behalf of appellee. We examined these instructions and fail to find them subject to the objection made. The court did not err in giving said instructions.

It is also contended by appellant that the court erred in failing to give an instruction covering the measure of damages. No instruction was tendered by appellant in reference thereto and it is therefore not in a position to raise this question.

Four instructions were given on behalf of appellee and fourteen instructions on behalf of appellant. The instructions on behalf of appellant covered every phase of its case. In fact all of the instructions offered by appellant were given by the court. Appellant has no cause of complaint on the court's rulings on the instructions.

It is further insisted by appellant that there was no evidence on which to base a verdict so far as the third count of appellee's declaration is concerned, being the count charging a violation of the speed ordinance. The evidence to support a verdict on this count is slight as it only tends to show that the engine was being run at about ten or eleven miles per hour prior to and at the time of the accident. However, under the repeated holdings of the Supreme and Appellate Courts of this State, one good count in

a declaration supported by the evidence is sufficient on which to base a verdict. Scott v. Farlin & Grendorff Co. 245 Ill.463; Olson v. Kelley Coal Co. 256 Ill.502; Gremson v. Donk Bros Coal Co. 259 Ill.338. It is not a ground for reversal that there may be no evidence in the record to support certain counts in the declaration and it matters not that the court may have over-ruled a motion to direct a verdict on said counts where the record discloses one or more good counts that are supported by the evidence. Scott v. Farlin & Grendorff Co. supra.

Lastly, it is insisted that the verdict of the jury is excessive and that the only conclusion to be drawn therefrom is that the jury in fixing the amount of appellee's damages was governed by prejudice or passion. While we are of the opinion that the verdict is amply large, at the same time the injury to appellee was serious, being the loss of his right foot. The evidence also is that appellee was confined to the hospital for some considerable time and that he was wholly incapacitated for several months and his earning capacity is seriously diminished. We therefore hold that the verdict is not so excessive as to warrant a reversal therefor.

There were other assignments of error but they were not argued by appellant and are therefore, under the rules of this court held to be abandoned.

Finding no reversible error in the record the judgment will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of April, A. D. 1918.

Charles C. Johnson
Clerk of the Appellate Court.

OPINION

FEE, \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

✓ Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 600

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The First National Bank of Vienna,
Illinois,
Appellant

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 36

October Term, 1917.

Johnson COUNTY

John T. Wilhelm et al,

Appellees

TRIAL JUDGE

HON.

W. A. BUTLER

Term No. 36.

In the Appellate Court

Volume No. 18

of Illinois, Fourth District,

October Term, A. D. 1917.

The First National Bank
of Vienna, Illinois,

Appellant

vs

John T. Wilhelm, et al,

Appellees

210 I.A. 600

Appeal from Circuit Court of

Johnson County, Illinois.

Opinion by Sayer, J. J.

On October 13th, 1916, a bill in equity in the nature of a creditor's bill was filed by the Farmers' and Merchants' State Bank of Cypress, Illinois, and the First National Bank of Vienna, Illinois, against appellees seeking to set aside a deed executed by John T. Wilhelm and Mary E. Wilhelm, his wife, to Mary E. Wilhelm, dated August 8th, 1915. Said bill alleges said conveyance was made with the intention of defrauding said complainants, and that said premises are held in trust for the said John T. Wilhelm and for the purpose of preventing a levy and sale to satisfy certain judgments which said complainants severally obtained after the execution, delivery and recording of said deed. Said bill alleges that appellee, John T. Wilhelm, was the owner and seized of the undivided one-third of said premises; and that appellee, Catherine M. Feiler, also holds some interest in said premises, the exact nature of which is

unknown to said complainant.

Said bill prayed for answer under oath and that appellees, "according to the best and utmost of their several and respective knowledge, recollection, information and belief, to full, true, direct and perfect answer made to all and singular the matters and things hereinbefore stated and charged, and especially that they may set forth and state the facts and circumstances attending such conveyance, the amount of money actually paid thereon by the said Mary E. Wilhelm to the said John E. Wilhelm and how and in what manner the payments were, or were to be made, from when the said Mary E. Wilhelm received the funds to make the purchase and the purpose of said conveyance;" and praying that the sheriff be directed to levy upon, advertise and sell the interest of the said John E. Wilhelm in said premises and for other and further relief.

Appellees, John E. Wilhelm and Mary E. Wilhelm filed their sworn answers to said bill in one of which said answers said appellees denied that appellee, John E. Wilhelm was or had been the owner in fee of the land covered in the bill of complaint or any part thereof at any time. Further answering, appellees aver that about May 10, 1898, William B. Beeler, father of appellee, Mary E. Wilhelm, died intestate leaving him surviving, appellee, Catherine B. Beeler, his widow, Samuel B. Beeler and W. B. Beeler, his sons, and appellee, Mary E. Wilhelm, his daughter, his only heirs at law; that prior to and at the time of his death said William B. Beeler was the owner in fee simple of about 1300 acres of land which constituted the premises claimed in said bill of complaint. That the personal estate

of said deceased was divided among said parties and that thereafter in the year 1891, a voluntary partition of the premises left by said deceased was made among said sons and appellee, Mary L. Wilhelm; that in making said partition, deeds were executed among said parties for the respective tracts of land to be taken by them; that the deed to appellee, Mary L. Wilhelm, was executed before one Grant Davis, a Justice of the Peace on June 8, 1891, and that at said time, Mary L. Wilhelm was the only person named as grantee in said deed; that after said deed was acknowledged before said Justice of the Peace the same was delivered to appellee, Mary L. Wilhelm, and by her delivered to her brother, Samuel B. Leeler, to be by him placed of record in the recorder's office of Johnson County; that, thereafter appellee, Mary L. Wilhelm, was informed that the name of John L. Wilhelm, appeared in said deed as a grantee; but appellee aver that after said deed had been placed of record, she was informed by her brother, Samuel B. Leeler, that said deed was not recorded in any other name or grantee, except that of her own, in other words, that she was informed by the said Samuel B. Leeler that the records of Johnson County showed that she was the sole grantee in said deed and that she relied upon said information and did not know that the records showed to the contrary until about the first of August, 1918; that since they learned of said fact, the deed sought to be set aside was executed, but appellee in said answer expressly deny that said deed was made as a sham or that the same was made to hinder and delay creditors of the said John L. Wilhelm or that there was any other intention except that the records should show the title in Mary L. Wilhelm, as the same was and had been held by her

during all of the time since said voluntary partition; and that at the time of the execution of the said deed, appellee, John C. Wilhel, had no notice, or expectation that he would be called upon to pay the debts above mentioned, he being only a surety on said notes.

Another answering complainant says that since the date of the execution of the deed from her brothers aforesaid in the year 1889 they have occupied said premises as and for their homestead except for a temporary absence of three or four years and were occupying the same as such when said answer was made.

A replication was filed to said answer and said cause was referred to the master in chancery to take the evidence and to report the same to the court. Upon filing of the report of the evidence taken in said cause, a hearing was had before the Circuit Court of Johnson County. A finding was made in favor of appellee and said bill was dismissed for want of equity. Appellant, First National Bank of Vienna, alone prosecutes this appeal.

The evidence offered on the part of appellant, together with the sworn answers of appellees clearly establish that appellee, Mary E. Wilhel, derived title to the premises in question by inheritance from her father and by voluntary partition made by the heirs of said deceased. It is contended by appellant, however, that notwithstanding Mary E. Wilhel, so derived title to said premises that she voluntarily allowed the deeds made by her said brothers for the premises which she was to take in said partition to include the name of her husband, and to be recorded in the recorder's office of said county, and that by reason thereof

the said John T. Wilhelm, should be held to be the owner of an interest in said premises in fee simple, or that if not so held to be the owner said premises, Mary T. Wilhelm, should be held to be estopped to deny such ownership as against appellant, the holder of said judgment.

The record discloses that the deed sought to be set aside was made on August 1, 1910, whereas the judgment taken by said court was not taken until December 22, 1910. The record also discloses that John T. Wilhelm paid no consideration for said conveyance.

In the case of *McCurry v. Bartley*, 13 Ill. 2d 1, the court in passing upon said judgment failed to raise any issue. 123 says: "The deed executed to McCurry for money paid and received before defendant in error recovered his judgment, and was, therefore, notice of the rights of Mrs. McLaure and children, when he levied upon and sold the property. But it is insisted if McLaure owed the debt, he could not make a voluntary settlement upon his wife and son, in such a manner as to prevent defendant in error from avoiding the transaction and subjecting the property to the payment of his debt. Had the property been paid for with the funds of McLaure, and not with those of his wife and son, this would have been undeniably true. If, if the judgment had become a lien before the conveyance to McCurry was made and recorded, or the receipt of actual notice, then defendant in error would have occupied a legal advantage that would have availed in this controversy."

To the same effect is *Barry v. Dickinson*, 111 Ill. App. 124.

The Justice of the Peace who took the acknowledgment

to the deed made by appellees, Mary J. Wilhelm and her said brothers testified that at the time the conveyance was acknowledged, that the name, Mary J. Wilhelm, was the only name in said deed as grantee according to his best recollection. Said Justice further testified that Samuel M. Feeler made the statement that he would see that the name of John T. Wilhelm was put in the deed as grantee. The evidence is further to the effect that after the deed had been recorded Mary J. Wilhelm had information that her husband's name was in the deed as grantee and she inquired of her brother in regard thereto and the evidence tended to show that he stated that the record of the deed showed only in her as grantee. Her brother, however, testified that he did not remember of having made such statement. Appellant further contends that even though the deed as originally made did not contain the name of appellee, John T. Wilhelm as one of the grantees, that in September 1881, a discrepancy in the deed was corrected and that the same was re-executed and was again filed for record and at that time said deed contained the name of John T. Wilhelm as one of the grantees. While the record discloses that a deed was filed in September 1881 which contains the name of John T. Wilhelm as grantee, the testimony of the Justice of the Peace who took the original acknowledgment to said deed is to the effect that Samuel M. Feeler, brought a deed to him but that he has no recollection as to what the deed was and as to whether it was the deed referred to or not.

The evidence further discloses that in about 1881 appellee Mary J. Wilhelm entered the name John T. Wilhelm as grantee in said partition deed; that being long prior to the making of the notes on which appellants' judgment was taken

so that the record fully discloses that it was the intention of appellees that the title to said land should be in appellee Mary E. Wilhelm alone.

We are of the opinion therefore that it was the intention of said parties that the fee simple title should be vested in appellee, Mary E. Wilhelm alone, and that the deed sought to be set aside was made in order to carry out that intention and not for the purpose of defrauding or hindering the creditors of John W. Wilhelm.

The record further discloses that no bank's officers who took the notes which were signed by John W. Wilhelm as surety did not rely on the deed records. The evidence being to the effect that no examination was made of said records, and the evidence also discloses that no representation was made by either of appellees to said bank or its officers to the effect that appellee John W. Wilhelm was the owner of any part of said premises.

Where a sworn answer is received and after weighing the material allegations of the bill, it is evidence for the defendant of such force that the complainant can have no decree against him until the same is disproved by evidence amounting to that of one witness in addition thereto a preponderance of proofs sufficient to have sustained the bill if the oath to the answer had been waived. *Way v. Cullinan* 135 Ill. 272; *Rich vs. Rich* 238 Ill. 396. The evidence offered on the part of appellant was not sufficient to overcome the sworn answer of appellees.

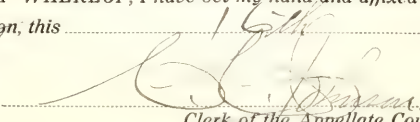
Finding no reversible error in the record the decree of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of April
A. D. 1918


Clerk of the Appellate Court.

OPINION

FEE S

.....

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 615

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Charles Pryde,

Appellee

~~ERROR TO~~

APPEAL FROM

vs.

Circuit COURT

No. 48

October Term, 1917.

Marion COUNTY

Chicago-Sandoval Coal Co.,

Appellant

TRIAL JUDGE

HON. J. C. MC BRIDE

Term No. 48.

In the Appellate Court
of Illinois, Fourth District
October Term, A. D. 1917.

Agenda No. 55

Charles Pryde, Appellee)
vs.)
Chicago-Sandoval Coal)
Company, Appellant)

210 I.A. 615
Appeal from Circuit Court
Marion County, Illinois.

Opinion by MOORE, J. J.

Appellee, Charles Pryde, recovered a judgment for \$3000.00 against appellant, Chicago-Sandoval Coal Co. in the Circuit Court of Marion County in an action on the case brought to recover damages for injuries sustained by appellee while employed by appellant in its coal mine at Sandoval, Illinois. To reverse said judgment this appeal is prosecuted.

The declaration consists of three original counts and one additional count. The first count charges that appellant negligently and carelessly permitted and allowed a certain loaded car of coal to run unimpeded along an entry in which appellee was then walking, without any means of controlling the same, and without giving any warning or signal, whereby the car ran upon the plaintiff from the rear and injured him.

The second count is the same as the first except that in addition to the allegations in the first count, it charges that appellant failed to equip said car with lights.

The third count averred that it was the duty of appellant in hauling and conveying trains of cars along said entry to exercise reasonable care to have the cars properly

#13 A.I.O 13

coupled in a reasonably safe manner, so that said trip of cars could be properly controlled and would not be liable to become uncoupled and detached from the trip and run wild and unimpeded; that appellant negligently failed and neglected to have said cars so properly coupled and attached, and that by reason thereof one of the cars became uncoupled and ran unimpeded along the entry, without any means of controlling the same and without any lights thereon or any warning or signal of the approach of said car; that as a result thereof and on account of the dark and unlighted condition of said entry the said car ran into the plaintiff and injured him.

The additional count averred that appellee and other employees were required to use the main south entry as a passageway to go to and from their working places in the mine to the shaft; that said entry was dark and unlighted, except the light from the pit lamps; that the track along the entry was rough and uneven and contained abrupt depressions or swags; that the track was laid so close to the rib side of the entry that cars in passing would strike and jolt against the rib or sides of the entry; that by reason of the condition of said track and its close proximity to the sides of the entry, one of the cars composing said trip then being conducted through said entry was jarred and jolted and was caused to break loose and become detached from the trip and run unimpeded along said entry without any lights thereon, etc.

The record discloses that appellee on September 7, 1916, and for more than two years previously thereto had been employed as a miner by appellant in its mine No. 2 at Sandevel, Illinois. In said mine there is an entry known as the main

South which is the principal haulage way connecting the southwest part of the mine with the shaft. This entry runs from the southwest part of the mine in a general northerly direction until it intersects the main west entry, leading to the shaft. This entry is the only passageway through which the men employed in the southwest part of the mine can pass to and from their work. At a point in said entry between 350 and 500 feet south of the main west entry there is a low place, referred to by the witnesses as a "swag or swail". At the bottom of this swag or swail there is a short stretch of track that is substantially level and from that point south for 500 or 600 feet there is a slight up grade and from the swag north there is an upgrade of about one to one and a half per cent. The roof of the entry had been shot down in the center so as to form an arch over the track and was higher over the track and over the cars as they would pass along the track than it was at the rib or side. About the middle of the afternoon in question appellee had quit work and started to the bottom of the shaft for the purpose of going out on the next cage. When appellee reached a point in the entry about 30 feet south of the bottom of the swag his attention was attracted to a trip of 10 ~~xx~~ or 12 loaded cars going north and approaching him from behind. Upon observing the trip of cars appellee stepped off the track into a place of safety until the motor and cars attached to it had passed. Appellee then stepped back on the track between the rails and started north. Shortly thereafter he was struck by a loaded car of coal coming from the rear; was knocked down and his right leg was severely crushed and broken.

It is first contended by appellant for a reversal of the judgment in this case that the trial court erred in its rulings on the evidence. Some six or seven witnesses who testified on behalf of appellee were allowed to testify over the objection of appellant that on account of the low places in the roof at and near the place where appellee was injured large quantities of coal were from time to time raked off of the trips of loaded cars, and that by reason of these obstructions and by reason of the track being lower at this point than at any other point along said right of way and by reason of the cars used by appellant in its mine being old and in large part being without proper bumpers or no bumpers at all, the cars would frequently become uncoupled from the trip and would follow along unattended and unattended, thereby endangering the lives of the miners who had to use this passage way in going to and from their work.

We are of the opinion that in view of the allegations of negligence in the different counts of the declaration that the evidence was proper as tending to show knowledge on the part of appellant of the dangerous condition in its entry way at and near said point. In other words, it was proper for appellee to offer evidence tending to prove notice on the part of appellant of the dangerous condition of said entry way and while we believe the court should have limited the examination a little more than it did, at the same time we do not believe that the appellant was seriously prejudiced by the ruling of the court in this regard.

It is next contended by appellant that there is a variance between the proofs and the allegations of the additional count of appellee's declaration. That count charges "that the said track along and through said entry was rough and uneven and contained abrupt depressions or swags therein, and in diverse places along said entry was laid and construc-

ted so close to the rib or side of said entry that cars in passing thereover would strike or jolt against said rib or sides of the entry," etc. Whereas, the evidence is to the effect that the loaded cars in passing through the entry struck and jolted, if at all, against the roof of the entry. The record, however, discloses that the entry way was so constructed that the rib or side of the entry merged into the roof or archway so gradually that it was hard to determine where the rib or side ended and the roof began. We are therefore of the opinion that the variance, if a variance at all was not a material one and that appellant could not have been prejudiced on account thereof.

It was held by the Supreme Court in the case of Jones & Adams Co. v. George, 227 Ill.64, where there was an allegation that the roof of the entry swayed down and caught a car passing thereunder and the proof showed that the timbers of the roof swayed down by pressure of the roof above and that the car caught upon such timbers, that there was no variance.

Variances which are not material are at most only harmless error and not cause for reversal. Jones & Adams Co. v. George, supra; Hinton v. Tyler, et al 103 Ill.App.454.

It is also contended by appellant that the verdict of the jury is against the manifest weight of the evidence. The evidence in reference to the dangerous condition of the entry was conflicting. Some six or seven witnesses on the part of appellee beside himself testified to the effect that large quantities of coal were raked or jostled off cars at or near this point; that the passage way was dirty & with gob and coal; that the roof at or near the point where appellee was injured was so low that the miners had to stoop

in passing along the same and that on account of coal and dirt and said low roof at and near the rib of said entry the miners were compelled to walk in the center of the track. The roof over the center of the track being considerably higher than the roof near the rib or sides. Said witnesses further testified that cars frequently became detached from their trip at and near this point and would run unimpeded along said track in said entry; that there were no lights in the entry except the lights on the caps of the miners and the light that might be on the motor pulling a trip of cars, and that on account of the dust arising from the passage of a trip of cars it was hard for the miners to distinguish objects at any considerable distance.

Appellee testified that after said trip of cars had passed, before he stepped on the track he looked in the direction in which the detached car came from and that he did not see it. On the other hand appellant's witnesses, some four or five in number, testified that the coupling and bumper on the car in question that struck appellee was in good condition; that there was but a little coal or dirt in the passage way; that they had this passageway cleaned some two or three times a week; that there was a marker on the rear car, being the car that struck appellee, and that this should have indicated to appellee that a car or cars had become detached from the trip.

Appellant elected not to pay compensation and be bound by the provisions of the workmen's Compensation Act, so the defenses of assumed risk, contributory negligence and of fellow servant are not available to appellant, and the question of whether or not appellant was guilty of negligence as charged in appellee's declaration or some count thereof

was a question for the jury. There is sufficient evidence in the record to support the finding of the jury of such negligence. The evidence tends to show a dangerous condition ~~had existed~~ in the entry way where appellee was injured and that this dangerous condition had obtained for some considerable time and that appellant and its officers either knew of this dangerous condition or by the exercise of reasonable care should have known of the same.

It is next contended by appellant that the court erred in giving the second instruction given on behalf of appellee. We have examined this instruction and do not think that it is subject to the criticism made. This instruction has in practically the same form been approved by the Supreme Court of this State. *Chicago & Joliet Electric Co. v. Patton*, 219 Ill.214. The court did not err in giving said instruction.

It is next contended by appellant that the court erred in its rulings on exceptions taken to the remarks made by counsel for appellee in his argument to the jury. An objection was sustained to a part of the statement made by counsel and overruled as to the remainder. We have examined the language used and do not think the court erred in its rulings thereon.

Separate instructions were tendered by appellant to be given by the court directing the jury to find appellant not guilty as to each of the counts of the declaration. It is here urged by appellant now that the court erred in failing to give said instructions, especially the instruction with reference to the third count of the declaration. The law is that if the evidence in the record is sufficient to support the verdict and judgment on any count of the declaration, it is sufficient. *Colesar v. Star Coal Co.* 255 Ill.532;

Scott v. Farlin & Crendorff Co. 245 Ill.460. Devine, Admr.
etc. v. Chicago City Ry.Co., 171 Ill.App.349.

In Scott v. Farlin & Crendorff Co. supra, the court said in quoting from Consolidated Coal Co. v. Scheiber, 167 Ill. 539, at page 463 says; "If there is one good count to which the evidence was applicable and which is sufficient to sustain the judgment, the error of the court, if any, in refusing to instruct the jury to disregard the other counts becomes harmless." We hold that the evidence is sufficient to support the verdict and judgment in this case.

Error was also assigned by appellant to the effect that the verdict of the jury was excessive. This assignment of error was not taken up by counsel in their brief and argument and is therefore, under the rules of this court, held to be abandoned.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

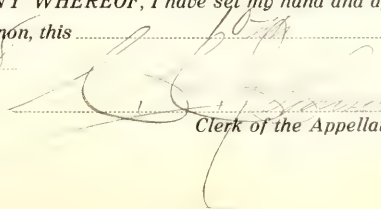
Judgment affirmed.

Justice McBride took no part on the hearing or decision of said cause.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of
A. D. 191.....


Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

✓ Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 617

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Lottie Oldfield, et al,

Appellees

~~ERROR TO:~~

APPEAL FROM

vs.

Circuit

COURT

No. 50

October Term, 1917.

Marion COUNTY

F. G. Boggs,

Appellant

TRIAL JUDGE

HON. WM. B. WRIGHT

Term No. 56.

In the Appellate Court,

Agenda No. 57.

Fourth District.

October Term, A. D. 1917.

Lottie Oldfield and Herschel
Oldfield,

Appellees.

vs.

H. G. Rogers,

Appellant.

210 I.A. 617

Appeal from the Circuit Court
of Marion County.

Opinion by Rogers, J. J.

This is an action of replevin commenced before a Justice of Peace of Marion County, Illinois, by appellees against the appellant to recover thirty-three bushels of wheat. The wheat was not found by the officer and return made accordingly and the suit thereafter proceeded in trover. Upon the trial the jury returned a verdict in favor of the appellees for \$32.67 to reverse which judgment this appeal is prosecuted.

It appears from the record in this case that Frank Oldfield, the husband of Lottie and father of Herschel Oldfield appellees in this case, had prior to the fall of 1914 been engaged in farming in Marion County, Illinois, and that during the fall of 1914 he went to Sioux City, Iowa where he secured employment but his family remained on the farm for a time. In the fall of 1914 appellees sowed about six and one-half acres of wheat on Frank Oldfield's farm. The testimony tends to show that appellees had an arrangement with Frank Oldfield by which they were permitted to sow the wheat and were to have whatever it made. That they pur-

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chased the seed, Herschel plowed and prepared the land and sowed the wheat thereon. Later on the family also moved to Sioux City, Iowa. During the summer of 1915 Frank Oldfield returned to Illinois about harvest time and entered into an agreement with one F. E. Holford to cut the wheat in question and put it in the shock, which he did, and Frank Oldfield paid him for it. Frank Oldfield then entered into an agreement with the appellant by which appellant was to thresh the wheat, haul it to market and Frank Oldfield was to pay the expense of threshing and the appellant was to receive the straw. It further appears that at this time Frank Oldfield and Lottie his wife, were indebted to the appellant upon a note and some other small items amounting in all to about \$23.85 and it is claimed by appellant that Frank Oldfield at the time of making this agreement was to market the wheat and take out of the price received the expense incurred in threshing and the indebtedness of Frank and his wife to the appellant. The wheat was stacked and threshed and in accordance with the agreement was stored in appellant's bin and there was seventy-seven bushels of it but it was not sold because Frank Oldfield had directed him not to sell unless he could obtain at least one dollar per bushel for it and he had not been able to obtain that price. Later on the appellees say that they learned that appellant was claiming the right to apply the proceeds of the sale towards the payment of the indebtedness aforesaid and deny that they authorized Frank Oldfield to make any arrangement by which the proceeds of the sale was to be applied upon this indebtedness. Appellees admit, however, that he was authorized to have the grain marketed and deduct from it the expense incurred in threshing and marketing.

It further appears that during the month of January 1916 the appellee, Lottie Oldfield, sold the wheat in question to a Mr. Wiley at ninety-five cents per bushel and drew fifty dollars upon the sale. Wiley estimated that the wheat would shrink about two bushels and when he went to haul it the appellant refused to give him thirty-three bushels but did allow him to take the remainder.

It is contended by counsel for appellant that this wheat did not belong to the appellees but in fact belonged to Frank Oldfield and that the claiming of it by appellees was an after thought to avoid the payment of the indebtedness above mentioned. Appellant further insists that even if the wheat did belong to appellees that Frank Oldfield entered into a contract with appellant to sell this wheat and apply the proceeds, after the payment of expense, so far as necessary to the payment of the indebtedness and that he did not disclose that he was acting as the agent of the appellees but treated the wheat as his own. Upon this question the position of appellant is that inasmuch as Frank Oldfield failed to disclose that he was acting as the agent of the appellees that before they can recover they must perform the contract as a whole entered into by the agent of an undisclosed principal, and that he is entitled to retain the wheat until the expense of threshing and the indebtedness due to him has been paid. We understand the rule to be that where the agent of an undisclosed principal enters in to a contract with a third person who was ignorant of his agency that if such principal endeavors to enforce such contract he must enforce it as a whole and every defense which existed in favor of the agent would accrue to such third person in the defense of an action upon such contract. *Wiser vs.*

Springside Coal Mining Co., 94 App., 471 and cases there cited. The appellant invokes this rule in this case and insists that he is entitled to a lien upon this wheat for this indebtedness according to the contract with Frank Oldfield. While we believe this to be a correct rule of law we do not believe it applicable to this case as the appellees are not seeking to recover upon the contract that Frank Oldfield made with appellant but base their right of recovery upon the fact that they prepared the ground and sowed the wheat under an agreement with the husband and father that they were to have whatever was raised thereon. We do not believe this position tenable. If Frank Oldfield was not the owner of the wheat and was not authorized to sell it and apply the proceeds to the payment of his indebtedness then we are unable to see how he would have a right to retain a lien upon the wheat for the payment of such indebtedness. It does appear from this record and from the statements of appellees that Frank Oldfield did have a right to and was authorized to contract for the cutting, threshing and marketing of this wheat and to pay the expense out of the sale of the wheat, and this being true the appellant certainly would have a right to retain the wheat under his contract until the expense that had been incurred in threshing it had been paid, as Frank Oldfield was certainly an authorized agent for that purpose. The appellant denies that such expense has been paid by the appellees or by any one else. It is true that the appellee, Lottie Oldfield, says, "I was to leave ten dollars and the threshing should come out of that and the balance be returned to me out of the ten dollars"; but there is no evidence in this record that she left the ten dollars with Mr. Piley or any one else but the evidence does

show that she drew fifty dollars upon the wheat sold and that the wheat delivered at the price sold would only amount to \$41.80 so that we think it clear from this record that the expense of the thrashing was never paid or tendered before this suit was commenced and the appellant had the right to retain this wheat until such expense was paid.

The appellees in instruction No. 3 tells the jury that if the plaintiffs were the owners of the seventy-seven bushels of wheat and received only forty-four bushels that the plaintiffs were entitled to recover the market value of the balance of such wheat at the time of such demand. We do not believe that the appellees were entitled to recover the whole of this wheat, even if it belonged to them, until the expense incurred in thrashing it had been fully paid according to the agreement made with appellant and recognized by the appellees.

The appellant claimed upon the trial of this case, and now insists, that the wheat was the property of Frank Oldfield and not of the appellees and argues that the evidence shows, and it does tend to show, that it was sown upon Frank Oldfield's land by his team and implements and put in by his son, who was a minor, and that Frank Oldfield assumed the authority over it when it matured such as he would over his own wheat and that all of these facts tended to show that the wheat belonged to him and not to the appellees. During the progress of the trial Frank Oldfield was permitted to testify to the contract that he made with appellant about the taking care of this wheat, thrashing of it, marketing, etc., and gave what he claimed was the whole of the contract. Appellant upon the trial offered to prove by himself that he and Frank Oldfield repeated the contract in the presence of

appellant's son and that appellant said to Oldfield that he would care for and thresh the wheat if they would pay him what they owed him out of the wheat and that Frank Oldfield agreed to it but an objection was sustained to this evidence; the court also refused to permit appellant's son to testify to the contract as it was stated to him by Frank Oldfield and the appellant; and the court also refused to allow appellant to show how much the indebtedness was that was due and owing to him. We think this was error.

One of the theories upon which appellant tried his case was that the wheat belonged to Frank Oldfield and they certainly had the right to introduce this circumstance as tending to show that the wheat belonged to Frank Oldfield; and the sons testimony tended to corroborate that of appellant with reference to what the contract was. Frank Oldfield had given his version of the contract and we think that appellant and his witnesses had the right to give their version of this contract as well, and the jury could then determine from all the facts and circumstances to whom the wheat belonged. If the wheat in fact belonged to Frank Oldfield and he entered into an agreement with appellant by which appellant was to take possession of the wheat and thresh it and sell it and pay his indebtedness out of it then such contract would be enforceable.

There are other errors complained of but we do not deem it necessary to comment upon them specifically as enough has been said that on another trial such errors may be corrected without further suggestion by this court.

We are of the opinion that the appellant had a lien upon the wheat in question for the expense incurred in thresh-

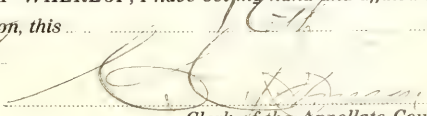
ing and caring for the wheat according to the agreement made with Frank Oldfield and recognized by the appellees; also that the giving of the instructions above referred to was erroneous and that it was error to exclude appellant's version of the contract, and the judgment of the lower court is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of
A. D. 191.....


.....
Clerk of the Appellate Court.

OPINION

FEE, \$

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 619

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Minnie Van Osdale, Admr.,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 51

October Term, 1917.

St. Clair COUNTY

Illinois Central R. R. Co.,

Appellant

TRIAL JUDGE

HON. GEORGE A. CROW

Term No. 51

In the Appellate Court
of Illinois, Fourth District
October Term, A.D. 1917

Agenda No. 22

Minnie Van Osdale, Administratrix
of the Estate of Glysses C.
Van Osdale, deceased,

Appellee

vs.

Illinois Central Railroad Company,

Appellant

210 I.A. 619

Appeal from Circuit Court

St. Clair County, Illinois.

Opinion By BOGGS, J. J.

This is an appeal from a judgment for \$1680.00 rendered in the Circuit Court of St. Clair county, in an action on the case for personal injuries sustained by plaintiff's intestate at a street crossing in the city of Belleville, and which said injuries resulted in his death. The declaration consists of four counts. The first count charges negligence generally in operating the engine to and over said street crossing; the second count charges that appellant was running its train in excess of six miles an hour in violation of the ordinances of said city; the third count charges the violation of an ordinance requiring the continuous ringing of a bell when approaching and crossing the streets of said village; and the fourth count charges, violation of the statutory duty to keep the whistle blowing or the bell ringing continuously. To this declaration a plea of the general issue was filed by appellant; trial was had resulting in a verdict and judgment as above set forth.

The record discloses that appellant's railroad consisting of two main tracks crosses a public street in the

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city of Belleville known as South Mill street. One of said tracks is known as the North bound track and the other as the South bound track, both of said tracks run in an easterly and westerly direction. The north bound track was used for the west bound traffic and the south bound track is used for the east bound traffic. The South Mill street tracks are several blocks apart. Going north on South Mill street you come to the south bound track first. Occasionally in switching, trains would be operated on said tracks in either direction, but for all through traffic trains were operated as above set forth. Some two hundred and fifty to three hundred feet west of South Mill street was Airy Street. The second street west known as Silver street was something like 700 feet from South Mill street.

On the evening of July 23rd, 1916, at about 6:15 Archie Stokes, Henry Van Osdale and appellee's intestate were riding north on Mill street in a two cylinder run-about owned by Stokes. Stokes was operating the car. Next to him on the seat sat appellee's intestate. Henry Van Osdale stood on the running board of the automobile on the left hand side. When the automobile reached the crossing it was struck by a train running east over said South Mill street crossing on the track used for west bound traffic. The train consisted of a box car, tender and locomotive and was being backed, that is, the box car was being backed or pushed by the locomotive. The automobile after being struck was dragged a distance of some 180 to 300 feet. When the automobile was struck Henry VanOsdale jumped and saved himself, Stokes was run over and badly injured and plaintiff's intestate was killed. Appellant concedes there was no substantial error in the rulings of the court on the evidence,

or the instructions and that the verdict and judgment are not excessive if the record warrants a recovery in appellee's favor.

It is first contended by appellant that the court erred in denying the motion made by it at the close of appellee's evidence and again at the close of all the evidence, to direct a verdict in its favor. The rule is that if the evidence in the record with the inferences reasonably to be drawn therefrom fairly tends to prove the allegations of the declaration, the court should refuse to direct a verdict for the defendant. *Crane v. Hoan*, 226 Ill. 328; *Chicago City Ry. Co. v. Muley*, 218 Ill. 464.

The evidence in this record fairly tends to prove the allegations of appellee's declaration and the court therefore did not err in refusing to direct a verdict.

It is next contended by appellant that the verdict of the jury is against the manifest weight of the evidence and that the court erred in not granting a new trial for said reason. The evidence as to the speed of the automobile in which appellee's intestate was riding, the speed of the engine and car of appellant prior to and at the time of the injury and as to whether prior to the injury the bell on appellant's engine was being rung was conflicting. The evidence on the part of appellee tends to show that the automobile as it was being driven north on South Mill street was running about 15 to 17 miles per hour until it neared the crossing when it was slowed down to something like 12 or 13 miles per hour. The evidence on the part of appellant is to the effect that said automobile was running from 20 to 30 miles per hour at said time. The testimony of appellee's witnesses with reference to the speed of appellant's engine and car prior to and at the time of said injury is to the effect that the same was being

operated at a speed greatly in excess of six miles per hour, being the limit fixed by ordinance for freight trains running through said city. Henry Van Osdale and John Dannerholt witnesses for appellee both testified said engine was running about thirty miles per hour. The testimony of Dannerholt who was stealing a ride on the engine being to the effect that said engine was running thirty miles per hour; that he saw the automobile in which appellee's intestate was riding, and that it was not being run more than half as fast as the engine. Another witness, on the part of appellee testified that the engine was going so fast, he could not get off. Still another witness for appellee testified said engine was running faster than said automobile. Appellant's witnesses placed the speed of said engine at from six to seven or six to eight miles an hour. However, on cross examination it was disclosed that these witnesses were badly mistaken with reference to the relative speed of the engine and automobile, and that they must have been running at about the same speed just prior to and at the time of the accident. Another circumstance which goes in corroboration of the testimony of appellee's witnesses touching the speed of said engine is that the engine and car ran from 180 to 300 or 400 feet, as fixed by various witnesses, after said automobile had been struck. The automobile being dragged that distance.

The evidence further discloses that the engineer put on the air brakes in an attempt to stop the engine while on South Hill street where injury occurred. The jury would therefore be warranted in drawing the conclusion that if said engine ran from 180 to 300 or 400 feet after the brakes were applied before it was stopped, that it was being operated in excess of six miles per hour. Appellant practically con-

cedes that the engine was being operated in excess of six miles per hour, but contends that the evidence does not disclose that that fact was the proximate cause of the injury and death of appellee's intestate. Some eight or ten witnesses on behalf of appellee testified either that no bell was ringing or that they heard no bell rung on said engine. On the other hand the two brakemen, the engineer and fireman, and certain other witnesses on behalf of appellant testified that the bell was being rung prior to and at the time said engine crossed South Mill street. The evidence on the part of appellant discloses that the last whistle that was blown was at the Silver street crossing some 700 feet west of where the injury occurred. We think, therefore that the question of the negligence of appellant in the operation of its said engine was a question of fact for the jury and that the evidence in the record is sufficient to support the finding of the jury that appellant was negligent in the operation of said engine and car prior to and at the time of said injury.

Appellant's next contention is that the manifest weight of the evidence is to the effect that prior to and at the time of the injury appellee's intestate was not in the exercise of due care for his own safety and that his negligence contributed to his injury and death and that therefore a new trial should be granted.

The evidence on the part of appellee tends to prove that while the car appellee was riding in was being operated at a speed of from fifteen to twenty miles per hour prior to its near approach to said crossing, that the speed was slackened to some 10 or 12 miles per hour before reaching said track where the injury occurred. The evidence also tends to prove that when the car was in about a half block of said

track where the injury occurred, Stokes, the driver of the car, looked in both directions to see if a train were coming; that he saw none and continued his course across the track when the injury occurred. While the record discloses that a party 150 feet south of the crossing where the injury, occurred could see down appellant's track west some two blocks, being six or seven hundred feet, we are not able to say that the failure of the occupants of the automobile, after having once looked, to look again before crossing said track amounts in law to a failure to exercise due care. The law is that a party approaching a crossing in a city or village have the right to rely on the railroad company operating its trains in compliance with the ordinances of said city or village. In this case the jury had the right to draw the inference that if appellant had been operating its train at a speed of not to exceed six miles per hour and had it been ringing its bell continuously as it approached said crossing as provided by said ordinances, that said accident would not have occurred. Another thing to be observed in this case with reference to whether or not appellee was in the exercise of due care for his own safety prior to and at the time of the injury is that the track on which the injury occurred is the track on which west bound traffic is run. Said engine and car was being operated against traffic.

Where the evidence is conflicting and where reasonable minds would differ in the conclusions to be drawn therefrom, it is a question for the jury. *Chicago & Water Co. v. Hyslop*, 227 Ill.308; *Jones & A.Co. v. George* 227 Ill.64; *M.S.A. S.Co.v.McWorkle*, 219 Ill.357; *M.S.A. S.Co.v.Bark*, 212 Ill.268. We are of the opinion that in this case reasonable minds would differ.

It was clearly for the jury in view of the foregoing evidence to say whether or not appellee's intestate was in the exercise of due care for his own safety prior to and at the time of the injury, and we are not disposed to disturb their finding.

A large part of appellant's argument was devoted to a discussion of the proposition that persons who are engaged in a common enterprise are chargeable with the negligence of one another. The evidence in this case tended to prove that appellee's intestate, Stokes, the driver of the automobile and Henry Van Osdale, cousin of appellee's intestate, were on their way to the hospital to visit a friend who had been injured in a motorcycle accident and that Stokes the driver of the car was merely carrying appellee's intestate and Van Osdale as a matter of accommodation and not for hire. We have taken appellant's theory in this matter in determining whether or not the verdict of the jury was against the manifest weight of the evidence, on the question of the care exercised by appellee's intestate for his own safety.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 13th day of April
A. D. 1911

Clerk of the Appellate Court.

OPINION

FEE, \$...

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4172

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

- ✓ Hon. Franklin H. Boggs, Presiding Justice.
- Hon. Harry Higbee, Justice.
- Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 631

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Arthur H. Foote, et al, Trustees
in Bankruptcy, etc.,
Appellants

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 60
October Term, 1917.

Madison COUNTY

Horatio J. Bowman et al,
Appellees

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 60

In the Appellate Court
of Illinois, Fourth District
October Term, A. D. 1917.

Agenda No. 61.

Arthur E. Foote, Edwin J. Hyke
and Charles E. Laws, Trustees
in Bankruptcy of the Estate
of Bryant, Gore & Bowman Sales
Company,

Appellants

vs

Noratio J. Bowman and Noratio J.
Bowman, Trustees of the Estate
of B. Hyder

Appellees

210 I.A. 631

Appeal from Circuit Court

Madison County.

Opinion by Jones, D. J.

In March 1905 The Missouri Glass Company, with a capital stock of \$300,000.00, one half common and one half preferred, was organized under the laws of the State of Missouri, the name afterwards being changed to, Bryant, Gore & Bowman Sales Company. This company was engaged in the handling of Queensware and had its place of business in St. Louis, Missouri. In 1912 the Company went into bankruptcy having assets amounting to something like \$72,000.00 and liabilities of about \$250,000.00. Appellants, the Trustees in Bankruptcy, filed a bill in the Circuit Court of Madison County to compel appellee, Noratio J. Bowman in his own right and as trustee of the estate of B. Hyder to account for an alleged unpaid balance owing by him personally and as such trustee on stock subscribed in said Company. The said Bowman being a resident of the State of Illinois.

The bill alleges that long prior to 1905 there had been organized and in business at St. Louis a corporation

188 A 1013

known as the Missouri Glass Company, which said company went out of business in 1905. The bill charges that the old Missouri Glass Company with an original capital stock of \$200,000.00 had sustained losses whereby its capital had been reduced to \$150,000.00 in 1905; that certain stock holders and officers of the old company wishing to rehabilitate the old Company organized a new company under the same name, having a capital stock of \$300,000.00 issued as fully paid. Said payment being made by the transfer of the assets of the old Company to the new. The bill further alleges that this action was taken by and with the consent of the stock holders, including appellee, who in his own right held fifty shares and as trustee, fifty-two shares in the old company; that for every two shares in the old company three shares of stock in the new company were issued. It is further charged in said bill that nothing additional was paid for said stock.

Certain provisions of the Constitution and Statutes of Missouri were set forth in said bill and which were to the effect that under the law of Missouri any subscriber to or holder of stock of a corporation who failed to pay for the same in full in money or property or who knew that the same had not been so paid for, is liable to creditors if such corporation dissolves or ceases to do business leaving debts unpaid.

The bill further alleges that the actual value of the assets transferred to the new Missouri Glass Co. in payment for the \$300,000.00 of its capital stock did not exceed the sum of \$150,000.00. Said bill further sets forth that it was necessary to collect said alleged unpaid balance due on said capital stock in order to raise a fund to pay the indebtedness owing by said bankrupt, and prays for an accounting. An answer was filed by appellee in his own right and

as trustee in which he alleges that the exchange of the stock in the old company for the stock in the new was made in good faith and without notice of the manner in which the stock of the company was paid for; that the assets in the old company including the good will thereof were at the time of the transfer to the new company of the value of \$300,000.00; that appellants were estopped to enforce liability for unpaid stock for the reason that they knew how the subscriptions on said stock had been paid. Appellee in said answer also alleged lack of jurisdiction in the trial court to maintain said proceeding for reason, as alleged, that the Statutes of Missouri furnish an exclusive remedy for the enforcement of stock holders liability.

A replication was filed and the cause was referred to a special Master to take the evidence and report his conclusions. Said evidence was taken and reported by said special Master with certain findings to the effect that in 1905 the Missouri Glass Company was organized with a capital stock of \$300,000.00 as a successor of a former corporation bearing the same name, and that such new company took over all the property and business of the former company at a valuation of \$300,000.00. That no payment of money was made by any of the stock holders of the new company, the stock in the new company being issued to the stock holders of the old company in proportion to the stock held by them in the old company. The Master further found that taking into consideration the value of the good will of said old corporation, its assets with its good will was of the value of \$300,000.00 and paid in full for the stock issued by the new company. The master further found that under the laws of the State of Missouri the good will may be an asset of a corporation

and have a value and that under the law of said State the stock of appellee in said company had been fully paid and that the bill should be dismissed for want of equity.

Exceptions filed by appellants to the master's report was on hearing ~~and~~ overruled and the bill was dismissed for want of equity at appellants' costs. To reverse said judgment this appeal is prosecuted.

Appellee by his answer raises the question of the jurisdiction of the Illinois Court to entertain a bill for an accounting for an unpaid balance owing on a subscription for stock in a foreign corporation. The Courts of this state have jurisdiction of a bill of this character where the subscriber is a resident of the State. *Edward V. Schilling* 245 Ill.231; *Bell vs. Farwell*, 176 Ill.489.

Before taking up the case on its merits we will dispose of a question raised by appellants with reference to the burden of proof. It is contended by appellants that under the laws of Missouri the burden of proof rested on appellee to show that the tangible assets of the old company, together with its good will, was of the value of \$350,000.00 at the time of the organization of the new company. In order to have the benefit of the provisions of the law of a foreign State, it is necessary to plead the same before evidence can be heard in proof thereof. As appellants' bill fails to set forth the Missouri law referred to, neither the trial court nor this court can take notice thereof, and we hold, therefore, that on appellants rested the burden of proving the allegations of their bill.

The real controversy arising on this record is whether the stock of the new company as organized in 1905 was in good faith fully paid and this question depends on whether

the good will of the old Missouri Glass Co. had a money value of approximately \$150,000.00.

It is contended on the part of appellants that the good will of the old Missouri Glass Company had practically no money value at the time of the organization of the new company in 1905. On the other hand appellees contend that the preponderance of the evidence establishes the fact that the good will of said old company did have a money value in 1905 and that its then value was \$150,000.00.

Counsel for appellants in their argument concede that this question is largely one of fact, for under the law, both of Missouri and of Illinois, the good will of a corporation can have a money value which may go in payment to the extent of its value of corporate stock of the company. *Merry vs. Rood*, 168 Mo. 316; *Van Cleave v. Birkey*, 143 Mo.109; *Rumsey v. Kaine*, 173 Mo.351; *Cohen v. Toy Gun Mfg.Co.* 172 App. 332; *Gillette v. Chicago Title & Trust Co.* 334 Ill.373; *Coleman v. Hower*, 154 Ill.452.

Appellants offered no direct evidence touching the money value of the good will of the old Missouri Glass Co. on the date of its dissolution and the organization of the new Company, but base their argument on the fact that for some ten or twelve years prior to the organization of the new company the old company paid no dividends and on the fact that while the par value of the stock of the old company was \$200,000.00 the value of the tangible property of said company in 1905, the date of the transfer from the old company to the new, was only about \$152,000.00. In other words it is insisted by appellants that the good will of a company that for a period of ten years had not paid dividends and whose tangible property had lessened in value, could have no money value.

Three witnesses on the part of appellee who were familiar with the affairs of the old Missouri Glass Company testified that at the date of the transfer of its assets to the new company it had a good will, and that it had a money value at that time of \$150,000.00. As a basis for this valuation said witnesses testified to the effect that the old Missouri Glass Company had been doing business since 1856; that it had a reputation established throughout the middle west and was known as one of the best queens ware establishments in that part of the country; that it had about eight or ten thousand good accounts on its books; that it did a business of about \$450,000.00 a year; that its gross profits had run about \$120,000.00 per year; that it had on its staff from fifteen to thirty salesmen; that its credit was good; and that during the year previous to the organization of the new company the net profits of the old company amounted to about \$42,000.00. In explanation of why there had been no dividends paid by the old company for some ten or twelve years prior to the organization of the new, the officers of the old company testified that in 1893 the old Company had taken a lease on Twelfth street at a rental depending on the appraised value of the property and which cost said company an annual rental of something like \$26,000.00 per year and in fact run as high one year as \$28,000.00, whereas the rent it had been paying prior to that time had only been about eight or ten thousand dollars per year. That this company along with several others contemplated moving to Twelfth street, believing that the business was going in that direction. The Missouri Glass Co. however, being the only one that entered into a lease. That by reason of this move and by reason of having to pay this high rental they were unable to declare

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dividends, notwithstanding the business of the company during that ten years showed it to have a good will of considerable money value. The evidence tending to show that the said excess rent amounted in the aggregate to from \$184,000.00 to \$210,000.00.

One of the witnesses on the part of appellants, and who had been connected with the old company, on cross examination testified that "The Missouri Glass Co. had accumulated a large list of customers; we had some eight to ten thousand accounts which were considered the best in the country in that line." "The gross annual profits during the last ten years prior to 1905 was one hundred to one hundred and twenty thousand dollars on sales." In answer to the question, "what was the standing of the Missouri Glass Co. among its creditors in the business community?" He stated, "first class in every respect, the best in its line." This witness further testified, "We had formerly, prior to our moving from Third and Vine streets to Twelfth and Olive an annual rental amounting to eight or nine thousand dollars, and we jumped it to about thirty thousand dollars. We moved to Twelfth and Olive. There was a westward movement and everybody moved there. We were the pioneers and the hard times came--the panic--and the movement was knocked in the head. We were up there with a lease and we could not get out of it. We paid out \$210,000. excess rent up there without being able to increase the business. The new Missouri Glass Company was incorporated in 1905. We had gotten rid of that lease burden and were paying about \$9000.00 rental and I think did more business." This testimony was objected to by appellants on the ground that this witness in his direct examination had only been examined with reference to the con-

dition of the business as shown by the books. His testimony, however, in chief had to do with the assets of the corporation and as to whether or not it was increasing or diminishing in value as the business was being conducted. We are, therefore, of the opinion the cross examination was warranted. Without reference, however, to the testimony of this witness, we are of the opinion and so hold, that the special master and the chancellor who heard this case in the court below were warranted in finding from the evidence that the old Missouri Glass Company had a good will at the time of the transfer of its assets to the new company and that its value was approximately \$150,000.00.

Finding no reversible error in the record the decree of the Circuit Court dismissing said bill for want of equity will be affirmed.

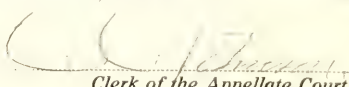
Decree affirmed.

Not to be reported in full.

Higbee J. dissents from the conclusion reached by the majority of the Court upon the ground that the proofs wholly failed to show the good will of the old corporation had a value of \$150,000 at the time the new corporation was organized.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 13th day of April A. D. 1910.


Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 633

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

David B. Crews,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 62

October Term, 1917.

Effingham COUNTY

Michael H. Cronk et al,

Appellants

TRIAL JUDGE

HON. WM. B. WRIGHT

Term No. 62

In the Appellate Court
of Illinois, Fourth District
October Term, A.D. 1917.

Agenda No. 58

David M. Crews, appellee

vs.

Michael M. Cronk and

Amy A. Cronk, appellants

210 I.A. 633

Appeal from Circuit Court

Birmingham County.

Opinion by Rogers, P. J.

This appeal is prosecuted by appellants to reverse a decree of foreclosure rendered in favor of appellee foreclosing a mortgage given by appellants. The record discloses that on August 27, 1915 appellants executed a mortgage on a 120 acre tract of land to one W. A. Duncan to secure a note for \$2275.00 given as part purchase money on 39 acres of land purchased of one Thomas L. Lee Land Co. located in Cameron County, Texas. Said mortgage was duly recorded and said note and mortgage was thereafter assigned to appellee, David M. Crews.

The record further discloses that the interest on said mortgage was payable semiannually and appellants having failed to pay the first installment thereof, appellee under the provision of the mortgage elected to declare the whole of the principal and interest on said mortgage due and payable and filed a bill to foreclose the same, making appellants parties defendant. An answer was filed by appellants admitting the execution of said note and mortgage as set forth

in said bill of complaint, but averring as ground of defense that on August 7, 1918, and prior to the execution of said mortgage appellant, Michael H. Cronk has been induced to purchase a tract of 35 acres of land in Cameron County, Texas from the Thomas F. Lee Land Co. through W.A. Duncan, Henry W. Litwer and G. A. Eskew, acting as agents for said land Company upon said Duncan, Litwer and Eskew agreeing to sell said tract of land prior to Feb. 1, 1919, or on failure so to do to accept a conveyance from said Michael H. Cronk and his wife for said land, and further averring that the said Thomas F. Lee Land Company agreed to grub said land and build thereon a four roomed bungalow; that appellants on August 27, 1918, in pursuance of and in consideration of said verbal agreement, executed their note for \$2475.00 and the mortgage mentioned in said bill to secure the same; that no money passed from said Duncan, Litwer and Eskew or the Thomas F. Lee Land Co. or either of them to the defendant but that said note and mortgage was made as part of the transaction and in consideration of the contract above mentioned; that said Duncan, Litwer and Eskew failed to sell said land before February 1, 1919, or to otherwise carry out their said agreement and averring that the consideration for said note and mortgage had wholly failed.

Said cause was heard by the chancellor in open court and a finding was made in favor of appellee and a decree of foreclosure was rendered foreclosing said mortgage, subject, however, to the homestead interest of appellants in said premises; the court finding that the acknowledgment to the mortgage being taken before ^{Wm} G.A. Eskew, an interested party, would not be valid and binding and that by reason

thereof the mortgage as to the homestead interest of \$1000. was null and void. The decree further provided for the appointment of commissioners to set off said homestead interest of \$1000.00. Appellants insist that the court erred in not dismissing said bill for want of equity, for the reason as contended by appellants, that the consideration for the execution of said note and mortgage was an agreement on the part of Lunce, Witwer and Laskew to sell said tract of land in Cameron County, Texas before February 1, 1916, or to execute a deed from appellants therefor and pay to them \$2275.00 and assume certain vendor lien notes given by appellants as balance purchase price on said Texas land, and that appellee as the assignee of said note and mortgage took the same subject to all equities which appellants might have against, W.A. Lunce, the payee in said note and mortgage.

Appellee insists in answer thereto that any verbal agreement made by Michael L. Cronk with Laskew, Witwer and Lunce, prior to the contract of sale entered into on August 7, 1915, for the sale of said tract of Texas land by the Thomas L. Lee Land Co. to appellant, Michael L. Cronk, was all merged in said written contract, and no charge of fraud or mis-representation having been made by appellants the written contract, must alone be looked to for the agreement of said parties at said time and that inasmuch as nothing was said in said written contract with reference to the sale of said land or as to the taking of the same off the hands of Michael L. Cronk, if not sold by February 1, 1916, that it should be said that no such contract was made. Second, that whatever arrangement or agreement that might have

been made on August 27, 1915, the day said note and mortgage were executed by appellants with reference to Witwer, Askew and Duncan selling said Thomas land before Feb. 1, 1916 or with reference to taking the same off of the hands of appellants, that said agreement was made subsequent to the execution of said note and mortgage and, that therefore, the execution of said note and mortgage was in no way based on the contract to sell said land or to take the same off of the hands of Askew, and, third, that even tho it should be held that said note and mortgage were given by appellants in consideration for the contract or agreement made by defendants, Witwer, Askew and Duncan to sell said land, or to take the same off appellant's hands, that in January 1916, appellant, Michael H. Cronk released and discharged said parties from said contract and rescinded and abandoned the same.

A bill for specific performance was filed by appellant Michael H. Cronk in the Circuit Court of Birmingham County prior to the commencement of said foreclosure proceeding in and by which said bill appellant Michael H. Cronk, prayed that the collection of said note and mortgage should be enjoined and said mortgage be held on a cloud on the title of appellant, and be removed as such. To said bill, Witwer, Duncan, Askew, Thomas A. Lee Land Co. and appellee, David E. Crews, were made parties defendant. Practically the same issues were raised with reference to the validity of the mortgage here in question as a lien on the land owned by appellant, Michael H. Cronk in said proceeding as is sought to be raised here, and counsel for appellants in this case practically concede that the determina-

tion of the issues in the specific performance case would in effect settle the matters in controversy in this case. The trial court found the issues against appellant, Michael H. Crock, on the bill for specific performance, and we at this term of this court have rendered an opinion affirming the judgment of said trial court.

It is held in that case and held here, that even though it be conceded that the note and mortgage given by appellants were given in consideration of the premises alleged to have been made on August 7, 1918, when the land was purchased by appellant of the Thomas B. Lee Land Company, and which agreement was alleged to have been renewed on August 27, 1918, and prior to the execution of said note and mortgage, it would not avail appellants for the reason that the preponderance of the evidence is to the effect that in January 1918, subsequent to the making of said contract, appellant Michael H. Crock released and discharged said parties from the obligation to sell said land or to take the same off his hands. That being true, the court did not err in finding the equities in favor of appellees and in decreeing a foreclosure of said mortgage.

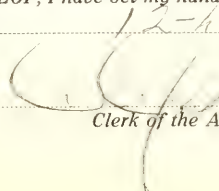
Finding no error in the record the decree of the trial court will be affirmed.

Decree affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 12-4 day of April
A. D. 1912


Clerk of the Appellate Court.

OPINION

FEE, \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

✓ Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And, afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

M. H. Cronk,

Plaintiff in Error

210 I.A. 634

ERROR TO
APPEAL FROM

vs.

Circuit

COURT

No. 63

October Term, 1917.

Effingham COUNTY

The Thomas F. Lee Land Co., et al,

Defendants in Error

TRIAL JUDGE

HON. WM. B. WRIGHT

Term No. 63.

In the Appellate Court

Agenda No.59

of Illinois, Fourth District

October Term, A.D.1917.

A. L. Cronk, Plaintiff in error

vs.

The Thomas F. Lee Land Co.,

L. T. Witwer, B. A. Makew,

and D. S. Crews,

Defendants in error

210 I.A. 634

Error to Circuit Court

Birmingham County, Illinois.

Opinion by Rogers, J. C.

Plaintiff in error, hereafter for convenience called, plaintiff, filed a bill for specific performance in the Circuit Court of Birmingham County, making defendants in error, Thomas F. Lee Land Company, L. T. Witwer, B. A. Makew and D. S. Crews, hereafter for convenience called, defendants, parties thereto, and praying the specific performance of a certain contract entered into between plaintiff and defendants, L. T. Witwer, B. A. Makew and A. L. Duncan, and for other relief. On a hearing before the chancellor in open court, a finding was made for defendants and a decree was entered dismissing said bill for want of equity. To reverse said judgment plaintiff prosecutes his writ of error.

The record discloses that on August 7, 1915, plaintiff entered into a written agreement with the defendant, Thomas F. Lee Land Co. whereby ^{he} purchased from said company a tract of land containing about 30 acres located in Cameron County, Texas. The purchase price therefor being \$6825. \$2275.00 was to be covered by the note of plaintiff secured by mortgage on 120 acres of land owned by him near Watson, in Birmingham County, Illinois, the balance of said purchase

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price to be secured by vendor lien notes of standard Texas form. Thereafter on the 27th day of August 1916, at the residence of plaintiff near Watson, Illinois, he with his wife executed a note for \$2275.00, secured by mortgage on said 120 acre tract of land and executed the vendor lien notes for the residue of said purchase price and delivered the same to W.A. Duncan, agent for said Thomas M. Lee Land Co. and accepted from said Duncan a deed for said 30 acre tract of land in Cameron County, Texas, together with the abstract of title thereto.

The record further discloses that on the same day and after the execution of said note and mortgage a contract was entered into between plaintiff and defendants, Duncan, Bitwer and Baker in and by which contract defendants stipulated and agreed to use their best endeavors to sell the real estate owned by plaintiff in Cameron County, Texas, prior to the first day of February, 1918. It being further stipulated by said contract that in the event that said premises were sold for a sum in excess of the purchase price, one half of said excess was to go to plaintiff and the other half to Duncan, Bitwer and Baker, and in the event that said defendants failed to sell said real estate by Feb. 1, 1918, that they were to accept a deed therefor from plaintiff and were to pay him the sum of \$2275. in cash and assume the vendor lien notes given by plaintiff. The bill alleges that prior to entering into the contract made between plaintiff and the Thomas M. Lee Land Co. on Aug. 7, 1916, Duncan as representative of said company, stipulated and agreed verbally that as a part of the consideration for plaintiff purchasing said land and entering into said contract, he, Duncan, "would under take to sell the same and pay to the complainant one half the profits thereof, or on failure so to do would take

the same off his hands and that then and there plaintiff agreed with said W.A.Duncan to do so and at that time H.T.Witwer one of the defendants herein, being then present and being an agent to sell land for the Thomas F. Lee Land Co. asked for the privilege of being made a party to said contract for the re-sale of said land." Plaintiff further avers in said bill of complaint that by reason of the agreement made by Duncan to sell said land or to take the same off of plaintiff's hands and upon the further agreement of the defendants, Duncan, Witwer and Eskew, made on the 27th day of August 1915, and prior to the execution of said note and mortgage by plaintiff and his wife, that they would sell said land prior to February 1, 1916, and divide the excess that they might recover over and above the amount to be paid for said premises by plaintiff, or if not sold by Feb. 1, 1916, that they would accept a deed from plaintiff for said 39 acre tract of land in Cameron County, Texas, and would pay to plaintiff the sum of \$2275.00. He, plaintiff with his wife, executed said note for \$2275.00 and mortgage, together with the vendor lien notes for the residue of the purchase price to be paid by plaintiff for said Texas land.

Said bill further avers that plaintiff has been at all times ready to convey said premises to said defendants, Witwer, Duncan and Eskew, but that they refuse to accept the same, etc. and prays specific performance of said contract.

The record further discloses that the note for \$2275. given by plaintiff and his wife was by Duncan, to whom it was made payable, assigned to D.B.Crews and he was made party defendant to said bill.

A joint answer was filed by defendant Witwer and Eskew and a separate answer was filed by D.B.Crews, all of



whom had been personally served with summons. Duncan and Thomas L. Lee Land Co. were not served personally and the court held in dismissing the bill that it had no jurisdiction as to the defendants, Duncan and Thomas L. Lee Land Company. In the answer filed by Witter and Askew they deny the making of the verbal agreement alleged to have been made between Duncan, representing said Land Co. and plaintiff and also denied that any agreement was made with reference to selling the land purchased by plaintiff in Cameron County, Texas, or as to taking it off of his hands prior to the execution of said note and mortgage.

Plaintiff insists that the court erred in finding the issues for defendants and dismissing said bill for want of equity and assigns as a reason therefor that the evidence discloses defendants did not sell said real estate as stipulated in said contract and that they had refused to accept a deed from him therefor and to pay to him said sum of \$2275.00. In answer thereto defendants insist, first, that no agreement was made in Texas prior to the execution of the contract between said Land Co. and plaintiff on August 7, 1912 to sell said real estate for plaintiff or in the event of his failing to sell the same to take said land off his hands; second, that even tho a conversation of that character had taken place prior to the execution of said contract, no charge of fraud or misrepresentation being made in said bill of complaint, all prior agreements made by said parties were merged in the written contract and that that, and that alone, must control; third, that no stipulation or agreement was entered into by them on August 29, 1911, prior to the execution of said note and mortgage and prior to the delivery to and acceptance by plaintiff of the deed to said Texas land and that

the agreement with reference to the sale of said Texas land was made after said note and mortgage were executed and that there was, therefore, no consideration for said contract, and lastly, that even the the contract made and entered into between plaintiff and the defendants, Witwer, Askew and Duncan on August 27, 1915, should be held to be a valid and binding contract, that prior to the first day of February, 1916, plaintiff released and discharged defendants therefrom.

The evidence in the record with reference to whether anything was said between plaintiff and defendants prior to the execution of the contract dated August 7, 1915, is conflicting. Plaintiff and his brother, John Frank, both testified that such an agreement was made and that said verbal agreement was the consideration for plaintiff executing said contract. On the other hand, Askew and Witwer both testify that no such contract was made and that they were both present at the time the written contract was entered into. In our view of the case, however, it is unimportant as to whether the conversation took place or not. The bill does not charge fraud or misrepresentation in obtaining the contract dated August 7, 1915; that being true, all prior negotiations of said parties were merged in said written contract. *Clark v. Gallory* 185 Ill.227; *Graham vs. Cadlier*; 160 Ill.98; *Hayes v. O'Brien* 149 Ill.414; *Eagle Fire Ins.Co.v.Spry Lumber Co.* 138 Ill.App.611.

In *Graham v. Cadlier*, supra. the court at page 98 says "When parties, after whatever previous preparation reduce their agreement to writing, such agreement is the final consummation of their negotiations and the exact expression of their purpose. What has preceded it, if not incorporated into it, is regarded as intentionally rejected."

The evidence is also conflicting with reference to whether anything was said between plaintiff and the defendants, Witwer, Askew and Duncan on August 27, 1916, prior to the execution of said note and mortgage, and prior to the delivery to and acceptance by plaintiff of the deed to the Texas land, with reference to said defendants selling said land. Plaintiff testified that such conversation and agreement took place prior to the execution of said note and mortgage, while Witwer and Askew both testified that no such conversation took place. We, however, deem it unimportant as to whether such conversation took place for the reason that irrespective of any such prior agreement the contract entered into between defendants, Witwer, Askew and Duncan with plaintiff on August 27th, 1916, was a valid and binding contract and based on a sufficient consideration as appears from the contract. The only question remaining then to be determined is as to whether plaintiff prior to February 1, 1916, discharged and released said defendants from the obligation to sell said Texas land or to take the same off plaintiff's hands.

The evidence with reference thereto is conflicting, but we are of the opinion that the preponderance of the evidence is to the effect that plaintiff did so release and discharge said defendants. Witwer testified that John Cronk a brother of plaintiff and who was one of the agents for said Land Company, together with Mr. Taylor, attorney for plaintiff, had made a trip to Texas and had visited plaintiff's land and that a short time after their return, being about the last Saturday of January 1916, he had a conversation with plaintiff and said to him, 'John told me they had made a deal with the Thomas F. Lee Land Company in regard to their land. He says, "Yes, I made a contract, or leased it rather, to the

Thomas L. Lee Land Company for ten years. They are to have all they can raise on this land, to make my payments, pay the water rights and the taxes for a period of ten years. Then they are to give me a release of these mortgages. That makes my land free and clear. I figured it was a good contract and John told me it was all right.' He, plaintiff in error, said it was all right for Van (referring to Ekew) and I to be released of this contract here. He says, 'I went ahead and fixed up the deal with them.' That is what he said about it. That was on Saturday after John (referring to his brother) and Frank (referring to Taylor his attorney) had come back from Texas, and so I told him that was all right, it was satisfactory with me, and for him to bring his contract up to my office after dinner and that I would be back at one o'clock."

The defendant, D.A. Ekew, testified: "I met Mr. Cronk, referring to plaintiff the latter part of January, 1916. I met Mr. Cronk and shook hands with him and says: 'As I understand your brother John and Mr. Taylor has just got back from the valley. He had some talk with your brother John.' He says: 'Yes, they fixed up a nice deal for me down there. They are going to rent that. They have really got two propositions. Mr. Lee thinks he has it sold at a nice profit to me, or they will lease it of me for ten years and pay the payments on my land, he having everything. In other words, in ten years this land to be free and clear, so you boys can consider yourselves dismissed from the proposition or contract for the resale of that land. You are out of it. I have turned it over to Mr. Lee.'" Defendants Witwer and Ekew are corroborated in their testimony by the witness Frank Taylor who testified to having heard the conversation

between defendant Arkew and plaintiff but does not give the details thereof as fully as testified to by Arkew. The only evidence to dispute these witnesses was the evidence of plaintiff who denied having had any of these conversations. The preponderance of the evidence with facts and circumstances surrounding the transaction go clearly to prove that plaintiff had abandoned or rescinded said contract and had released or discharged the defendants Wither and Arkew therefrom.

A release or discharge from an obligation or contract of this character, or abandonment of the same may be shown by parole. *Howman v. Cunningham*, 78 Ill.48; *Lasher v. Leoffler*, 190 Ill.155.

In *Lasher v. Leoffler*, supra. the court at page 155 says: "A party demanding that a court of chancery shall exercise the jurisdiction to enforce the specific performance of a contract must show he has himself always been ready, willing and eager to perform the contract on his part, and he cannot have a decree for specific performance if it is made to appear he has consented to a rescission of the contract or has abandoned it."

This case was heard by the chancellor in open court where he had an opportunity to see the witnesses and hear them testify, we would, therefore, not be warranted in disturbing his finding unless it was palpably against the weight of the evidence. *Hubbard vs. Hubbard* 198 Ill.624; *Fabrice v. Von der Brelie*, 190 Ill.466; *Kerdy v. Byas*, 203 Ill. 211; *Wiegerrstalf v. Wiegerrstalf*, 188 Ill.411.

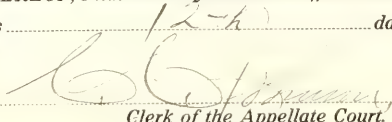
The court did not err in finding the issues for the defendants and dismissing the bill filed by plaintiff for want of equity and the decree will be affirmed.

Decree affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 12-6 day of August
A. D. 1918


Clerk of the Appellate Court.

OPINION

FEE, \$.

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 639

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

F. W. Moore et al.,
Plaintiffs in Error

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 5.
October Term, 1917.

St. Clair COUNTY

Union Trust and Savings Bank,
Trustee, et al,
Defendants in Error

TRIAL JUDGE

HON. J. F. GILLHAM

October Term, 1917.

and S. H. S. S.
J. H. S. S.

Plaintiffs in Error

v.

Union Trust and Savings Bank, Trustee

et al,

Defendants in Error.

210 I.A. 639

Error to Ct. Clair.

Opinion by Hughes, J.

The plaintiffs in error prior to January 24, 1908, were partners, under the firm name of Moore and Buchanan, in the real estate business in East St. Louis, Illinois. Their business chiefly consisted of purchasing tracts of lands adjacent to cities, platting the same into lots, blocks, streets and alleys and selling the lots on the weekly or monthly payment plan. On January 24, 1908, they dissolved the partnership by a written agreement. At this time they had a number of such additions in various parts of the country which they were promoting and which were not entirely closed up. By the agreement of dissolution defendant in error, the Union Trust and Savings Bank of East St. Louis, was named as Trustee, to collect the payments from the various additions still "alive" and generally liquidate the business of the partnership with reference to such additions.

One of such additions was known as the Hazelwood-Memphis addition and was adjacent to the City of Memphis, Tennessee. On May 17, 1907, plaintiff in error Moore and

988 A.1019

defendant in error August Schlaefly, who was President of the Union Trust and Savings Bank, went to Memphis and arranged for the purchase of the tract of land comprising this addition, from the owner Patrick Kallacher, for \$16,000.00 of which the sum of \$4000.00 was to be paid in cash, and the balance to be evidenced by five notes of \$2400.00 each, due in one, two, three, four and five years respectively. It was arranged that Schlaefly should pay the \$4000 in cash and execute his personal notes for the balance of \$12,000. The Bank of Commerce and Trust Company of Memphis was selected as Trustee to hold the title to the lands in trust for all parties, and for a specified commission, receive all payments, pay the notes given for the balance of the purchase price, and turn over the balance to plaintiff in error, and Schlaefly. The terms and conditions covering the transaction were verbally agreed upon and a contract reduced to writing, but not signed at the time. Schlaefly and Moore returned to East St. Louis. A draft for \$4000 and Schlaefly's five notes for \$2400 each were sent by him to the Memphis bank. A few days later Moore brought to the Union Trust and Savings Bank four copies of a contract, which he claims was the one drafted at Memphis. Schlaefly and Moore signed these copies and they were sent or taken by Moore to the Memphis bank.

The written contract as drawn was entered into by three parties, Patrick Kallacher of Memphis, Tennessee, being the party of the first part, the Bank of Commerce and Trust Company of the same place, the party of the second part and August Schlaefly of the City of East St. Louis, Illinois and Fletcher W. Moore and J. W. Buchneil, comprising the firm of Moore & Buchneil of the same place, parties of the third part. Section 11 provided, "When all the notes mon-

tioned in paragraph 1 herein (meaning said notes signed by Schlaify), together with the interest thereon, are said as above set forth, then first parties ownership and interest in and to this contract and the land above described, shall cease and terminate as hereinafter set forth and the said third parties jointly shall become the absolute owners of all unsold lots, uncompleted contracts of sale and unpaid balance of the proceeds in the hands of the said second party. And the said second party shall and does hereby agree to credit the said third parties at the time and in the manner in proportion as hereinafter stated and the unpaid balance of the proceeds then in its possession and all moneys thereafter derived from the sale of lots under this contract, and it shall and does hereby agree to hold all unsold lots and uncompleted contracts of sale in trust for said third parties."

Section 12 further provided "In and after the date when clause 11 of this contract shall become operative, the party of the second part shall (on the first day of each and every month) credit, after first deducting its compensation, all moneys then in its hands and all moneys derived from the sale of said lots and the moneys on uncompleted contracts thereafter received by it as follows: one-half to August Schlaify and one-half to George A. Bushnell until all moneys in said second parties' hands or received by it thereafter are placed to their respective credits; it being understood and agreed that August Schlaify and George A. Bushnell are joint and equal owners of all moneys to be derived from the sales of all unsold lots, on and after the date clause eleventh hereafter becomes operative."

After the dissolution of the partnership the Bank of Commerce and Trust Company received all moneys collect-

by it, after the payment of said five notes, advanced by Schlessly and certain other items which were not questioned, to the Union Trust and Savings Bank, Trustee, under the terms of the dissolution agreement. Out of the money received from the Memphis bank, the Union Trust and Savings Company repaid Schlessly the \$4000 of the purchase price less the land advanced by him in cash and also \$25 as his expenses for his trip to Memphis. Plaintiff in error contested the right of the bank to repay to Schlessly the \$4000 advanced by him and his said expenses and filed a bill in the circuit court of St. Clair county, Illinois against said Union Trust and Savings Bank and said Schlessly, asking that said bank be compelled to account to them for one half of said sum of \$4025 and alleging that Schlessly claimed some interest in the same. Schlessly filed a cross bill alleging in substance that prior to the drafting of any written contract, it was verbally agreed between Moore and him that after the payment of the five notes, he should be repaid the \$4000 of the purchase price advanced by him in cash and \$25 he had paid for expenses before any division of the profits but that by mistake this provision was omitted from the written contract, and he prayed for the reformation of the contract to make it conform to the real agreement between said parties. The cause was referred to the master in chancery to take and report the proofs, together with his conclusions. The master by his report recommended a decree in substantial compliance with the allegations and prayer of the original bill but the court sustained exceptions thereto and rendered a decree in conformity with the theory and prayer of the cross bill. To review that decree the complainants below have sued out a

writ of error from this court.

The first relief sought by the cross bill was the correction of the written contract so as to make it conform to what defendants in error claim to have been the oral agreement, and the principal question for us to determine is whether the facts in this case will justify such reformation as decreed by ^{the} ~~the~~ court. Mistake is one of the original heads of chancery jurisdiction. A court of equity having jurisdiction to relieve against the consequences of a mistake will afford such relief where the parties to a contract, after having made an agreement, failed to express such agreement in reducing it to a written form....three things are necessary to justify the reformation of a written instrument upon the ground of a mistake; first that the mistake be one of fact not of law; second that the mistake be proved by convincing and clear evidence; and third that the mistake was mutual and common to both parties to the instrument." *Johnson v. Co. v. Neal* 277 Ill. 48; *Lurynes v. Harrison* 181 id. 315. It is not denied that the mistake in this case if any occurred, was one of fact and not of law. It consisted in the failure to insert in the written contract words providing that defendant in error lawfully should be repaid the \$4000 before any division of the profits should be made. Nor does it appear that the mistake occurred on account of any want of reasonable diligence on the part of defendant. The evidence disclosed that Johnson and Moore had been interested together in at least one similar enterprise before this time and that Johnson relied upon Moore to draft the contract according to the oral agreement made in Memphis.

The \$4000 had been paid and the notes executed before the contract was signed so that the contract in question was not executed as an original transaction but by way of performance or putting into form an antecedent oral contract between the parties which had already been to some extent carried out. Schilly testified that the agreement between him and Moore was that he would repay the \$4000 advanced by him while Moore testified that nothing was said upon that subject and Schilly took no part in executing the agreement. The evidence appears to show that Schilly was acting in the transaction for the Union Trust and Savings Bank of which he was president and the bank carried this amount of \$4000 on its ledger in its real estate account, to which the bank examiner appears to have objected. To obviate this objection and at the request of the bank, Moore on February 13, 1917 gave to the bank his note for that amount on demand and at the same time the bank gave him a written receipt for the note containing this language, "This note we agree to cancel and return to J. A. Moore without payment on his demand or that of his estate." Moore contends that this note was given simply to meet the examiner's objection, but however this may be, on February 25, 1917 Moore and Schilly signed a written agreement providing among other things, that the note should be renewed from time to time "until the principal is liquidated and paid off by income from sale of property described in said agreement", and again "it is further agreed and understood that no interest shall be charged either to said J. A. Moore or against the proceeds from sale of said lands under above named contract, it being agreed and understood that said August Schilly, trustee's profits, if any, shall be derived from

the sale of said land as stipulated in other agreements between August Schleichly and Jacob and Emanuel." Even though this note was given by Jacob simply as accommodation paper to meet the objection of the bank examiner, it is difficult to understand why this last contract should have been executed in addition to the receipt given at the time the note was made, unless it was intended by the parties that Schleichly should be repaid the \$4000 from the proceeds of the sale of the lots.

The proofs appear to clearly show that the verbal agreement between the parties was that the entire purchase price of the land, including the \$4000 paid in cash and the expenses of Schleichly amounting to \$200 should be repaid out of the sale of the lots and that the balance remaining should be divided between the parties to this suit in the proportion of one half to the two plaintiffs in error and one half to the defendant in error Schleichly; that when the agreement as to the whole transaction was reduced to writing this portion of it was by mutual mistake omitted therefrom and therefore the contract as finally executed did not contain the true agreement of the parties. The chancellor who heard the case properly allowed the contract to be reformed and corrected in the respect above mentioned and his decree directing this to be done and providing that the funds received from the sale of the lots be divided between the parties in accordance with the terms of the reformed contract should be and is affirmed.

Acres affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of
A. D. 191.....

.....
Clerk of the Appellate Court.

OPINION

FEE, \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 653

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Henry F. C. Dettmer,

Appellee

~~ERROR TO~~

APPEAL FROM

vs.

Circuit

COURT

No. 9

October Term, 1917.

Madison

COUNTY

Illinois Terminal Railroad Co.,

Appellant

TRIAL JUDGE

HON.

LOUIS BERNREUTER

Term No. 6.

October Term, 1917.

October Term, 1917.

Henry W. C. Bettner,

Appellee

210 I.A. 653

v.

Illinois Terminal Railroad Company,

Appellant.

Opinion by Hinton, J.

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This appeal is from a judgment rendered against Illinois Terminal Railroad Company, appellant, in favor of Henry W. C. Bettner, appellee, for the sum of \$125 in an action on the case.

The declaration which was filed October 3, 1916 contains two counts. The first alleged an easement over appellee was the owner and in possession of a certain farm containing about two hundred acres; that prior to January 1, 1915, appellant built its railroad across Appellee's valley, west of and down stream from Appellee's land and filled up and totally closed the natural channel of Appellee's creek where it was crossed by said railroad and constructed a solid embankment across the same, twenty five feet high and one hundred feet wide; that appellee dug an artificial channel for Appellee's creek about four hundred feet south and east of the natural channel, which artificial channel was against and partly in a high bluff, and negligently constructed as the sole outlet for all waters coming down said valley, a concrete opening of insufficient size and

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width; that on August 21, 1915, heavy rain storm occurred in that vicinity and the waters which naturally flowed down said valley were obstructed by said embankment and accumulated and flowed against it to a depth of 15 feet and were held back up stream for several miles and upon appellee's premises and flooded and damaged his crops growing thereon to wit: 20 acres of timothy, 20 acres of corn, 10 acres of pasture, 5 acres of clover and one and one-half acres of potatoes. The second count containing the same averments as the first count with reference to the operation of said premises by appellee and the construction by appellee of said embankment across said valley with insufficient openings and alleges in substance that on August 12, 1916, heavy rain storm occurred in that vicinity and the waters naturally flowing down said valley were obstructed by said embankment and said upon appellee's premises and destroyed fourteen acres of corn then belonging to him; also that on January 3, 1916, other rains occurred and the waters were again held back upon appellee's land by said embankment and damaged and destroyed certain wire fencing and that on account of all said matters appellee sustained damages in the sum of \$2500.

Appellant filed a plea of general issue and three special pleas. The first special plea, after averring the incorporation of appellant and its authority under its charter to construct, maintain and operate its road alleges in substance that by virtue of such authority it did construct and had completed prior to September 1, 1915, its line of railroad and embankment as now located across Goshkin creek valley; that no changes were made in said embankment nor in

the bridge, culverts and openings were built. On the night of August 31, 1916, when the bridge over and across Columbia creek was washed out and destroyed by a certain flood was act of God; that the said embankment, bridges, culverts and openings were constructed in accordance with proper engineering and railroad engineering and were and at all times since have continued to be sufficient and adequate for any and all natural water flowage, which could reasonably and prudently be anticipated; that said embankment, culverts, bridges and openings, constituted a permanent and useful structure; that any damage that might have been caused to appellee's lands thereby sustained at the time such structures were built, the measure of which was the depreciation in the market value of the land and that none of such damage occurred to the appellee within five years. The second special plea is the usual plea of the statute of limitations. The third special plea was substantially the same as the first of the elements of the incorporation of a permanent and useful structure and alleged that such embankment and the openings and culverts through the same, constituted a permanent and useful structure and that whatever damage, if any, was occasioned by their construction was a damage to appellee's land and constituted a single cause of action which accrued and there accrued to the then owner of the land, the measure of which was the depreciation in the fair cash market value of the land and not damage or injury to the crops growing thereon. Replications were filed specifically and in detail denying the facts alleged in the pleas.

Appellant's railroad crossed the valley almost north and south at a point where the valley is approximately 1300 feet wide from bluff to bluff and runs almost east and

west. The old Madison County Railway Company constructed its railroad across the valley over 35 years ago. It was located upon an embankment about 4 feet above and 35 feet from Applicant's embankment and was practically parallel with Applicant's road until it neared the north side of the valley where it turned to the northwest and crossed Applicant's right of way. Applicant used this road under a license until it built its own road across the valley in 1904 and 1905, since which time the former road has not been used. Applicant's road is located upon an embankment about 12 feet high, 40 feet wide at the top and 10 feet wide at the bottom which crosses the old Madison County railway over head, that is, the latter road crosses through Applicant's embankment and beneath its tracks.

Lickie Creek is a tortuous and meandering stream and at the time Applicant built its road and embankment, flowed from the east for several hundred feet along the cliff on the south side of the valley, until it reached Applicant's embankment at which point it turned to the north and flowed along the right of way to a point about half way across the valley where it turned to the west and crossed the right of way and then flowed to the northwest back to the south cliff, forming practically a half circle or horseshoe. When Applicant first constructed its embankment across the valley it left three openings for the passage of water. One about 35 feet wide was through the old Madison County railroad, on the north side of the valley. Another was a trestle bridge about 100 feet wide at the top and 8 feet wide at the bottom over the old channel of the creek near the center of the valley. The third was a steel bridge

60 feet wide, near the south side of the valley. In the fall of 1915 or the spring of 1916 an embankment was extended across the old creek channel and the old divide or horsehoe in the creek was eliminated by the digging of a new channel through the 60 foot opening on the south side of the valley. The filling in of the old channel with the embankment across the valley with only two openings or outlets for the escape of the water, the one over the old Madison county railroad on the north side of the valley and the 60 foot opening on the south side of the valley through which the new channel was made to pass. This condition persisted until August, 1918, when, between the 17th and the first of that month, there was a rainfall in that vicinity of 11.64 inches. As a result the entire valley was flooded from head to head to a depth of 17 to 17 1/2 feet on the upper side of the embankment and 15 to 16 feet on the lower side, the water reaching an elevation at appellant's bridge of 445.6 feet (Lombard datum). On August 21, the concrete abutments on either side of the 60 foot opening in appellant's embankment on the south side of the valley were undermined and fell into the creek and about one hundred feet on the western part of this place was washed away. During the fall of 1918 and the spring of 1919 appellant rebuilt the bridge that was washed away, the new bridge consisting of a center span resting upon two concrete piers, 112 feet apart and 20 feet span at each end. This bridge is 212 feet long in all, the center span is 104 feet in the clear from the pier to the bottom and at either end is a concrete abutment placed on the embankment. When the bridge was rebuilt the concrete abutments from the old bridge which had fallen into the

channel were closed up by the dynamite and partly removed but some of the material was allowed to remain. It is about 2.5 miles from appellant's embankment up stream to the south line of appellee's land. The elevation of the valley at the embankment is 449 or 450 (approximate) and the elevation of appellee's bottom lands is 440 to 445. In January, 1916 there was a rainfall which flooded Cahokia creek valley and caused the water to reach an elevation on the lower side of appellant's embankment of 457.6, on the upper stream side of 463.4. In August, 1916 from the 17th to the 18th both inclusive there was a rainfall in that community of 6.63 inches and Cahokia creek valley was again flooded from Kluff to Kluff. The water over appellant's embankment was 7 to 7 1/2 feet deep attaining an elevation of 458.7. Appellee contends that by reason of insufficient openings in appellant's embankment, the water was retained and caused to back up and overflow his lands in 1915 and 1916 and for damages occasioned thereby to his crops and building on his land.

Counsel for appellant in their argument insist the judgment should be reversed for the reasons: first, the verdict is against the weight of the evidence; second, a verdict had the right to be given the jury and the court; third, the court erred in giving appellant's instructions Nos. 2, 6, 7 and 8, and fourth, the verdict is excessive. It is contended that the verdict is against the weight of the evidence because the record discloses that the cause which caused the overflowing of appellee's lands was unprecedented; that appellee's damages if any, were due to natural causes and would have occurred had there been no embankment; that the structure complained of was lawful and permanent and any damages occasioned thereby accrued when

it was constructed, the measure of which was the depreciation in market value; last for this there could be but one recovery and that within five years after the structure was built. Counsel's contention that the embankment was a lawful and permanent structure, that any damage or depreciation thereby occurred when it was constructed, the measure of which was the depreciation in market value and for which there could be but one recovery, and that by suit instituted within five years after the structure was built, is correct as a proposition of law and would be controlling here were it not that to recover damages resulting from the construction of the embankment. This action is brought, however, not for the recovery of damages resulting from the construction of the embankment, but for the recovery of damages resulting from the alleged defective and negligent construction of the same by the failure to provide sufficient outlet for the waters. "The duty of the railroad company to so construct and maintain its road across a stream as not to injure adjacent lands by throwing water back upon it is a continuing one, and each overflow resulting from a neglect of that duty creates a new cause of action for any injury thereby occasioned to the crops and lands; and successive recoveries may be had for successive injuries caused by such negligence. (*Ill. v. Co. v. Whillman*, 142 Ill.187; *Sanitary Dist. of Chicago v. May*, 129 Ill.88; *Carley v. Ill. & M. Ry. Co.*, 235 Ill.52; *Handelder v. Sanitary Dist.*, 194 Ill. App. 200.) The issues raised by the pleadings in this case come clearly under the line of authorities.

In constructing its embankment across "Chickie" creek valley it was appellant's duty as a matter of law to

provide ample outlet for the waters of such floods as were
etc. as men of ordinary prudence could have foreseen, but
not against the waters of such extraordinary floods as
could not have been reasonably anticipated. That was an
extraordinary flood in that particular valley and neither
the rains of August, 1915 and January and June 1, 1916,
were extraordinary floods, were questions of fact for the
jury. (See *Ray v. W. Hunter*, 225 Ill. 337). The evidence
shows the rains of January and August, 1916 were unprece-
dented, as neither of them was as heavy as the rain of
August, 1915, after which excellent result the bridge. In
August, 1915 the water reached an elevation at applicant's
bridge of 456.5 feet (Gordon's datum), in January, 1916,
457.5 and in August, 1916 only 455.7. The doctrine is well
established that although a rainfall may be more than ordi-
nary, that is extraordinary, yet if it be such as has oc-
casionally occurred even though at irregular intervals, it
is to be foreseen that it will occur again and it is the
duty of those changing or obstructing the flow of water to
provide against the consequences of such rainfall (See
Lytle v. Lundy, 133 Ill. 9; *Ill. St. Ry. Co. v. Hunter*, supra;
even though the rainfall of August 1915 was unprecedented, yet
if the alleged failure of applicant to provide sufficient
outlet for the ordinary flow of water, contrasted, together
with such unprecedented flow of water to the flooding of
applicant's land, applicant would be liable for any
injury caused thereby. (See *Ill. Ry. Co. v. Hillman*, supra;
Youdrie v. Southern Ry. Co. 125 Ill. App. 379; *Hendricks v.*
Sanitary District, supra; *Winey Gas & Elec. Co. v. Smith*,
123 Ill. App. 647; *Casey v. Kelly-Atkinson Court Co.*, 148

The evidence conclusively shows specified property damaged by the water flowing in 1917. It was a question of fact to be determined by the jury whether such damage was due wholly to such extraordinary floods to which prudence could not have anticipated, or wholly to appellant's alleged negligence in failing to provide sufficient outlets, or to both such causes. (200 F. 2d v. 211, supra) By returning a verdict for appellee the jury in effect found that appellant's alleged negligence in failing to provide sufficient outlets, at least contributed to such overflow and the facts in proof appear to sustain such finding. While Cahokia creek in an ordinary stage of water was confined to a narrow channel, yet in times of heavy rains, prior to the construction of appellant's embankment, the water frequently reached from bluff to bluff, as is clearly established by the evidence. It was at such a point only to provide outlets for this extraordinary overflow water as for the channel water. In connection with streams like Cahokia creek, the courts make no distinction in this respect between channel water and overflow water. (200 F. 2d v. 211, supra). Appellant when it filled the old channel in 1917, provided only two openings, one at the concrete bridge over the new channel at the south side of the valley, and the other at the right of way of the old Madison County Railroad on the north side of the valley. The evidence shows the water would have to reach a depth of 3 or 5 feet in the valley before it would flow through the north opening. There was a great deal of evidence submitted on this question, some of it conflicting but from the proofs as

whole it does not appear from the evidence submitted that either of the rains, was caused solely by such unprecedented rainfall as could not have been reasonably anticipated. As was said by the court in *U.S. Dist. Ct. v. Carter, supra*, "In any event this was solely a question for the jury, and if they were correctly instructed on that point this court cannot interfere." While the foregoing content or official disposals of appellant's contention that appellee's damages, if any, were due to natural causes and would have occurred had there been no abatement, it might be further said in the language of the Supreme Court in the case of *Sanitary District of Chicago v. May, supra*, "The land was bottom land near the river and was subject to overflow before the channel was changed, but there was evidence tending to prove that such overflow and consequent injury to crops, etc., were increased by the alleged negligent construction of the new channel, and while it seems from the record, that it would not be a wholly unjustifiable inference to draw that the defendant had been charged with losses which would have occurred had the channel remained as it was in a state of nature, still we cannot say that the verdict is so clearly against the weight of the evidence as that it should be set aside for that reason." While appellant had the right to change the channel of the creek upon its right of way, yet in making such change it had no right to obstruct or in any way interfere with the flow of the water. This doctrine was recognized by the Supreme Court of this state in the early case of *Gilman v. Madison County, 49 Ill. 444*, and that decision has since been consistently followed. (*U.S. Dist. Ct. v. Thillman, supra*; *Sanitary Dist. of Chicago v. May, supra*; *Randfelder v. Sanitary Dist. supra*; *Collins v. Sanitary District, 203 Ill. App. 43.*)

It is insisted by counsel for the instructions complained of are erroneous because they advise the jury that it was the duty of the agent in constructing the embankment to provide outlets sufficiently large to permit the escape of all waters that naturally come down the valley whether unprecedented or not, and whether confined to the channel or not and also because they fail to inform the jury appellant was not bound to provide outlets sufficient for the waters produced by unprecedented rains or floods. These instructions should be read in connection with the language of all the instructions, the allegations of the pleadings and the facts in the case (*St. L. Ry. Co. v. Hillman*, supra.) It was not necessary for each and every instruction expressly to state that appellant was not bound to provide sufficient openings for the waters of extraordinary rains or floods. Appellant should have constructed its embankment and bridges so as to take care of all waters of the valley, which could be reasonably anticipated. This has been held to mean more than the ordinary rainfall. Appellant should have provided "for the escape of the water of such unusual or extraordinary floods as it should have anticipated would occasionally occur in the future, because they had occasionally occurred after intervals, those of irregular durations, in the past." (*St. L. Ry. Co. v. Hillman*, supra; *St. L. Ry. Co. v. Heuter*, supra). By instructions given in behalf of appellant the jury were told appellant was not entitled to recover if his damage was caused by the natural overflow of Cahokia creek and not by the embankment; that appellant had the right to build the embankment provided it left sufficient openings for the escape of all waters that

might be reasonably anticipated and also that if the jury believed from the evidence that such coverings were made sufficient to allow hail surface or other water that might be reasonably expected or anticipated by reasonably prudent persons they should find for appellant. The instructions when read in a whole, and considered in connection with the allegations and the record fairly stated the law applicable to the case and do not contain reversible error.

The contention of counsel that the verdict is excessive is based on the theory that none of the damage sustained by appellee as a result of the rains of 1916, was known to have been caused by appellant's delinquent. As hereinbefore pointed out, this was a question of fact for the jury and under the law and the facts in proof this court cannot disturb the finding of the jury in that respect. Including damages for the rains of 1916 the verdict is not excessive. The judgment will be affirmed.

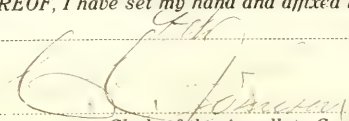
This suit is similar to the case of Albert Lind against the same party in which an opinion has been cited at this term, except in that case the damages sued for were alleged to have been caused by the floods of August 1916 alone, and therefore much of the language used in that opinion has been repeated here.

affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of: April
A. D. 1918


Clerk of the Appellate Court.

OPINION

FEE, \$.

4783

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 657

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Mabel M. Link, Admrx. etc.,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit

COURT

No. 17.

October Term, 1917.

Madison

COUNTY

Alton, Granite & St. Louis Traction

Co.

Appellant

TRIAL JUDGE

HON. J. F. GILLHAM

October Term, 1917.

Edel M. Link, Administratrix, etc.,

210 I.A. 657

Appellee

vs.

Appeal from Madison.

Alton, Granite & St. Louis Traction
Company,

Appellant.

Opinion by Bigbee, J.

Appellee's intestate, George E. Link, was struck and killed by a north bound passenger car on appellant's road at a highway crossing in Madison county, Illinois, December 25, 1915.

The crossing where the accident occurred is a short distance south of Mitchell, a station on the electric line which appellant operates between East St. Louis and Edwardsville. At this point appellant's track runs almost north and south, and west of it, in close proximity, there are four other railroad tracks running parallel to it. On the south side of the highway, and about 45 or 50 feet east of appellant's track was located the school of Boden and Hockenthal. North of the highway is Long Lake terminating at appellant's right of way and extending to the east. Appellant's track is elevated about four feet at the crossing and about 175 feet south of the crossing, and 10 feet east of the track is its Long Lake passenger waiting shed, a frame building eight by three feet. The road is practically straight from Mitchell to a point about 100 feet south of

700 and 015

passenger shed, where it begins to make a gradual curve to the west.

The deceased, who was a farmer, fifty three years of age, left home about 9:30 on Christmas morning with his 15 year old daughter, Irma, driving a mule team to an open buggy. They stopped at the home of a relative and then drove on to Mitchell, where they met Charles E. Smith, also a farmer. The daughter returned home and Smith and Link drove on to Beckn and Backenthal's saloon, reaching there about ten o'clock. Beckn, Smith and Link played a card until about 12:30 A. M., each taking two drinks of whiskey during that time. About 12:45 deceased and Smith went out of the saloon, got in the buggy and started west, and while crossing appellant's track were struck by a north bound car. The buggy was wrecked and both Smith and Link received serious injuries from which they shortly afterwards died. At the time of the injury the motorman was eating his lunch and the conductor was operating the car.

A declaration consisting of four counts was filed against appellant and the East St. Louis and Suburban Railway Company. On the trial of the cause the suit was dismissed generally as to the East St. Louis and Suburban Railway Company and the first and fourth counts of the declaration were dismissed as to appellant. The jury having failed to agree a second trial was had on the second and third counts of the declaration to which a plea of the general issue was filed. The negligence charged in the second count was the running of appellant's car at a high, fast and dangerous rate of speed and in the third count was the running of appellant's car at a high and dangerous rate of speed without giving any warning or signal of the approach.

of the car to the crossing. The second trial resulted in a verdict for appellee of about which the court, after overruling a motion for a new trial, entered a judgment from which appellant perfected an appeal to this court. Counsel for the parties on both sides of the case devote their arguments very largely to a discussion of the facts and it is to the proof that we will direct our attention.

It is fundamental, so much so that it is unnecessary to cite authorities, that in cases of this nature the plaintiff must prove affirmatively that the injured party was in the exercise of ordinary care for his own safety at and immediately prior to the time of the injury, and it is not sufficient for the plaintiff to prove simply that the death was due to the negligence of the defendant. The plaintiff has the burden of proving both these issues and failure to prove either of them by a preponderance of the evidence is fatal to his case. The only witnesses who claimed to have actually seen the car strike the buggy were the conductor and the motorman of the car and a man named Oranger, who was coming along the track from the opposite direction in which the car was going, and who reached the crossing or very nearly so, just as the accident happened. These witnesses all stated that appellee's intestate was driving, that both he and Smith had their heads down, and were not looking in any direction or ~~was~~ making any efforts to ascertain whether or not any car or train was approaching from either direction. Oranger also testified that as he came near to the two men in the buggy he shouted a warning of the approaching train to which they paid no attention. The fact that the highway at this place crossed five railroad

tracks running parallel and in close proximity to each other, making it an unusually dangerous crossing, must have been known to deceased as he lived only about one mile from Mitchell, and was familiar with the locality. He should have exercised care and caution commensurate with the known danger. There is no evidence in the record whatever that he looked or listened for a car. On the contrary all the evidence in the record bearing upon his action and conduct as he drove upon the track, tends most strongly to show that he was totally indifferent to the danger in attempting to cross the track without looking or listening to ascertain whether or not a car was approaching.

A number of witnesses testified and a number of photographs were introduced on both sides upon the question whether the view of the track in the direction from which the car came was obstructed. It was claimed by appellee that the view was obstructed by the station shed and the trolley poles; that is, that by reason of a slight curve south of the shed, the poles were in such relative positions that a car could not be seen between them from the highway between the saloon and crossing. Most all of the witnesses testifying in behalf of appellee admitted, that for a portion of the distance along the highway from the saloon to the crossing, a view can be had of some of the track to the south. All admitted however, the view of the track as far south as the station shed, a distance of 175 feet, was unobstructed. The witnesses differed as to how much of the distance in coming from the saloon to the crossing along the highway the view of the track south of the station shed was obstructed. Those testifying for appellant on this question stated that except for a distance of two or three steps, a view of the

track south could be had from any point on the highway between the saloon and crossing. The testimony of all the witnesses considered with the photographs introduced in evidence clearly show that there was no such an obstruction as to have prevented the deceased from seeing an approaching car in time to have avoided the accident and he looked in that direction and exercised the care an ordinarily prudent man would have exercised in driving over such a crossing. It is a serious question whether or not anything was shown in the proof by which the deceased was relieved of his duty to look and listen for the train as he approached the track, and whether by failing to do so, he was, under the evidence in the case, guilty of such contributory negligence as would bar a recovery as we held in the case of *U.S. v. St. Louis & N. Ry. Co. v. Sparks*, 122 Ill.App.4th. But in any event we are convinced that the verdict of the jury was against the manifest weight of the evidence and while we are not prone to disturb the verdicts of juries who have seen the witnesses upon the stand and heard them testify, yet where such verdicts are against the manifest weight of the evidence as appears to be the case here, it is our duty to do so. *Donaldson v. N. St. L. & Sub. Ry. Co.* 228 Ill.620; *U.S. v. O'Connell v. Becker*, 111 Ill.App.103.

We are of opinion the respondents of the evidence fails to show any negligence on the part of appellant. The negligence charged is failure to give proper warning and approaching the crossing at a dangerous rate of speed. Four witnesses testified on behalf of appellee with more or less positiveness that no signal or warning was given for the crossing. Besides the conductor and motorman and the witness

Granger, six persons who were passengers in the car testified on behalf of appellant that the whistle was sounded some distance below the crossing and that a number of short blasts, called "warning" or "danger" signals, were given just before the accident. The motorman and conductor testified these danger signals were first given to warn Granger who was walking down the track, and were continued when the team and buggy were observed. The testimony of witnesses who were passengers in the car shows that the speed of the car was perceptibly slackened with a jerk, and then slightly increased again just before the accident. The conductor who was driving the car at the time, testified this was due to the fact that he applied the brakes because of Granger's presence on the track, and released them when he saw the latter step therefrom, but almost immediately applied them again, as he then saw the team and buggy. Before the brakes were first applied the car was shown to have been traveling about forty miles per hour, and when it struck the buggy about twenty five miles an hour. This crossing was not within any city or incorporated town, and the rate at which the car was traveling cannot be said to have been excessive or dangerous under the circumstances in proof.

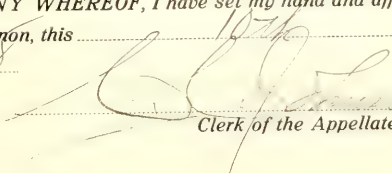
For the reasons above given the judgment of the court below will be reversed and the cause remanded.

REVEREND AND HONORABLE.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of
A. D. 1918


Clerk of the Appellate Court.

OPINION

FEE, \$

63

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 I.A. 659

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Henry Fitzgerald,

Appellee

~~ERROR TO~~

APPEAL FROM

vs.

Circuit COURT

No. 23

October Term, 1917.

Massac COUNTY

W. H. Neville et al,

Appellants

TRIAL JUDGE

HON. ROBERT T. COOK

October Term, 1917.

| | | |
|----------------------|---|--------------------|
| Henry Fitzgerald, |) | |
| Appellee |) | |
| v. |) | James from Lascac. |
| |) | |
| W.H. Neville, et al, |) | |
| Appellants |) | |

Opinion by Higbee, J.

Appellee recovered a judgment against appellants in the circuit court of Lascac county, for the balance claimed to be due him on a written contract under which he had constructed for them, three brick walls extending and enlarging their garage in Metropolis, Illinois. The contract price was \$1086, all of which was paid but \$106.57, which amount was retained by appellants as damages claimed to have been incurred by them by the failure of appellee to comply with the terms of the contract.

The suit was in assumpsit for the unpaid balance and the recovery was for that amount. The contract provided for the construction of three walls of a one story brick building 100 feet long and 42 feet wide adjoining another building. It was provided that appellee should furnish all the building material which was to be "first class". The contract further provided "the party of the second part agrees to construct the outside of the walls of the herein mentioned building, out of first class 28 brick and no soft brick are to be used in the construction of the herein mentioned walls". It was agreed upon the trial that

appellants had paid the amount provided for them to pay by the contract, except said sum of \$166.57, and it appeared that this amount was held back by appellants because they claimed appellee failed to use the quality of brick stipulated in the contract to be used, but instead used brick of an inferior quality which did not make the walls as substantial as was earlier stated by the terms of the contract and lessened its merchantable value from 140% to 145%. It was a contested question on the trial as to whether or not appellee had furnished brick which substantially complied with the terms of the contract and also as to whether by the terms "the outside of the walls" used in the contract, was meant all of the three walls of the building as claimed by appellants which were to be 13 inches thick or only the outer 4 inches of such walls as claimed by appellee. Evidence was introduced by the respective parties of the kind of material placed in the walls and whether or not the same complied with the terms of the contract and also to explain what was meant in the building trade by "the outside of the walls".

We will not discuss the weight of the proofs as this case must be determined upon questions arising from the instructions but the above statement of facts appeared to be necessary to show the relation of the instructions to the facts. The first instruction given for appellee is as follows: "If the defendants took over and have used the building the plaintiff would be entitled to pay for his services at their reasonable worth even though the building did not comply with the contract in any degree whatever." The uncontradicted proof showed that plaintiffs took over the building and used it as soon as the defendants completed

their work upon the same and this instruction would require a verdict in favor of appellee for what his services were reasonably worth, even though the material and workmanship in the building did not comply with the terms of the contract in any degree whatever. By it defendants were precluded from recouping damages for any failure on the part of appellee to furnish material of the quality contracted for by him. In *Step v. Wenton*, 46 Ill. 467, which was an action in assumpsit brought by certain contractors to recover for work and labor in building a church, it was contended by them that there had been an acceptance of the building by the trustees and it was there said by the court in the course of the opinion, "Unless the trustees accepted the property in full discharge of the contract, they could recoup damages sustained by reason of its performance in a manner different from the agreement, although they may have done acts amounting to an acceptance". The proof in this case failed to show that appellants accepted the building in full discharge of the contract, but on the contrary did show that they claimed damages for inferior brick used by appellants and retained out of the contract price, the amount here sued for, for that reason. The taking over and using of the building therefor, would not prevent them from recouping such damages as they may have suffered, if any there were, from the use of material not permitted by the contract. As applicable to the facts in this case therefore, the instruction was misleading and did not state the law correctly.

Instruction No. 3 told the jury that if appellee "performed the contract, or substantially performed it, he would have a right to recover the contract price therefor,

less any payments made in reduction of the contract prices. This instruction failed to state the full measure of the law. It is true that a literal or strict compliance with a building contract is not always a prerequisite to a recovery by a contractor, though ordinarily a substantial compliance with the contract in good faith is sufficient. But even if there were a substantial compliance with the contract in this case entitling appellee to recover, yet nevertheless that would not necessarily entitle him to recover the full contract price and appellees would be entitled to a deduction therefrom of a sufficient amount to indemnify them for the expense of making the work conform to that for which they had contracted or in case that could not be done, a deduction of a sufficient amount to pay them for such damages as they may have suffered by reason of the failure of appellee to fully comply with his contract. *Boeler v. Herr*, 157 Ill. 57; *Eaton v. Kenton*, supra.

The fifth instruction given for appellee contains the same vice as the third and was therefore given in error. The following instruction offered by appellants was refused by the court, "The jury are instructed that as a matter of law, the plaintiff Henry Fitzgerald cannot recover under the declaration in this case unless, he has shown by a preponderance of the evidence in the case, a contract fully or substantially performed on his part." This instruction clearly stated a correct principle of law applicable to the case and should have been given. For the errors above indicated the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 8-17 day of Oct. A. D. 1911

Charles C. Johnson
Clerk of the Appellate Court.

OPINION

FEE, \$

41851

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

210 T.A. 661

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Garret Wilkins,

Appellee

~~ERROR TO~~

APPEAL FROM

vs.

Circuit.....COURT

No. 24

October Term, 1917.

Madison.....COUNTY

Madison Coal Corporation,

Appellant

TRIAL JUDGE

HON. J. F. GILLHAM

October Term, 1917.

Garret Wilkins,

Appellee

v.

Madison Coal Corporation,

Appellant.

210 I.A. 661

Appeal from Madison.

Opinion by Higbee, J.

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A former judgment in this case in favor of appellee was reversed and the cause remanded by this court at the March Term, 1914, the opinion being filed July 28, 1914. A second trial was had in the circuit court which resulted in a verdict of the jury in favor of appellee for \$1000. This verdict was set aside by the trial court, and a new trial granted which resulted in another verdict in favor of appellee for the sum of \$1275. Judgment was rendered on that verdict and defendant below appeals.

We have carefully examined the evidence in the present record and find that in all its essential features, it is substantially identical with that before this court on the former appeal, and as the facts were fully stated in our former opinion it is not necessary to repeat them here. It is sufficient to say that this is a suit by appellee to recover damages for personal injuries sustained by appellee while working for appellant in one of its mines. On Wednesday, November 1, 1911, appellee with his buddy, Paul Nau, were engaged in operating a machine in undercutting coal in

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a cross cut that was being opened up from room No. 1 towards room No. 2 off of the fourteenth north entry on the main east entry of said mine. At about 11 o'clock A. M. on said day, while he was so engaged a piece of slate fell from the roof of the cross cut upon appellee, seriously injuring him.

While two additional counts were filed to the declaration after the cause was remanded by this court, no new questions appear to have been raised by the pleadings. The first additional count charges, as did the first original count, that the mine examiner of defendant wilfully failed and omitted to inspect the roof and to observe the dangerous material therein. The only difference between the two counts is that the first additional count alleged "there existed in the roof of said cross cut and over the working place therein, a lot of dangerous and insecure material which was likely to come down and injure those engaged in the work of undercutting, etc;" whereas the first original count alleged that "there existed in the roof of said cross cut and over the working place therein, a lot of slate, dirt, rock and other material that was insecure and dangerous and likely to come down at any time and injure those engaged in the work of undercutting etc." The second additional count alleged as did the original second count that, "The mine examiner of the defendant within twelve hours preceding the morning of said day, went into said cross cut and inspected the working place therein and observed said dangerous roof at said point and wilfully failed to place a conspicuous mark and sign thereat as notice to all men to keep out and to make a daily record of the conditions in a book kept for that purpose". The only difference between these two counts

is that the second additional count alleged "that there existed in the roof of said cross-cut and over the working place therein, a lot of dangerous material which was likely to come down at any time etc.", whereas the second original count alleged that "there existed in the roof of said cross-cut and over the working place therein, a lot of loose, cracked and dangerous slate, dirt, rock and other material which was likely to come down at any time, etc".

There is no evidence in the record contradicting the testimony of the mine examiner that he examined the roof in question at about three o'clock on the morning of November 1, and made his daily record of the same, and there is also no dispute as to the fact that he did not mark the place as dangerous. Practically the only question to be determined under the pleadings upon which there was any contest whatever in the ~~xxx~~ proofs is whether or not the roof was in a dangerous condition at the time the mine examiner examined it. This is the principal question which was considered by this court on the former appeal, in which the judgment was reversed, because the findings of the trial judge, before whom the case was tried without a jury, were manifestly against the weight of the evidence. In this case, as in the former case appealed to this court, appellant's mine examiner testified he examined the roof thoroughly at 3 o'clock in the morning and it sounded solid. The witnesses Louis Arnoldi and Fred Pryer, who went into the cross-cut about 8 o'clock in the morning, both testified they sounded the roof and found it solid. Arnoldi testified that at 10 o'clock in the morning he set a prop in the cross-cut at the order of the face boss; that he then sounded the

part of the roof which afterwards fell and it was solid. The fore boss Tremgen testified he saw appellee sound the part which fell just before the prop was set and it was solid and all the witnesses agree that the place where the prop was set did not fall.

As opposed to this evidence appellee and his buddy, Paul Bau testified they sounded the roof on Wednesday morning, November 1 and it sounded drummy and this seems to have been substantially the same as their testimony on the first trial. Appellee further testified that he sounded the roof on Monday, October 30 and it sounded drummy and this is the only material testimony in this record that was not in the former. Bau corroborated appellee to some extent by testifying that the latter did sound the roof Monday, but that witness left the cross-cut as he did go and did not hear how it sounded. Counsel for appellant questioned the truthfulness of this testimony of appellee for the reason that he did not so testify on the first trial, but appellee contends the reason he did not do so was because he was not interrogated at that time on that question, all of which has been carefully considered by us. On the former appeal we held that the record then before the court affirmatively showed that the roof was solid at the time the mine examiner examined it and also that the dangerous condition arose after the room had been examined by the loaders in the morning, and that such being the facts in the case, appellee, under the authorities therein stated and discussed, was not entitled to recover damages from appellant. The additional testimony given on this trial when carefully considered in connection with all the other evidence in the case, does not vary the proofs sufficiently to warrant us in reaching a

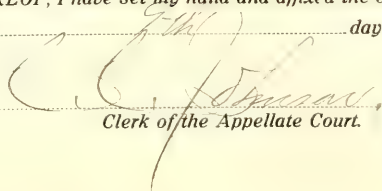
conclusion here different from that reached by us on the former hearing. In accordance with our views of the principles expressed in our former opinion, which must prevail here, the judgment in this case will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of
A. D. 191.....


Clerk of the Appellate Court.

OPINION

FEE, S...

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